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## **THESIS**

**AFGHANISTAN'S CONSTITUTIONS: A COMPARATIVE  
STUDY AND THEIR IMPLICATIONS FOR AFGHAN  
DEMOCRATIC DEVELOPMENT**

by

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March 2006

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**AFGHANISTAN'S CONSTITUTIONS: A COMPARATIVE STUDY AND THEIR  
IMPLICATIONS FOR AFGHAN DEMOCRATIC DEVELOPMENT**

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## **ABSTRACT**

Afghan constitutions have had a tendency to marginalize Afghan society. As a result, the continued ethnic fragmentation of Afghanistan has minimized the capacity of constitutions of the past to achieve societal stability. Instead, past Afghan constitutions have explicitly supported regimes rather than address the problems of the fragmentation of Afghanistan into small ethnic, linguistic, familial, and in some cases religious elements. While Afghanistan's current constitution accommodates the multi-ethnic pattern of Afghan society, it provides only a partial solution to the challenges of state building created by multi-ethnic societies. The central purpose of this thesis, therefore, is to determine the sustainability of Afghanistan's current constitution by analyzing the legacy and impact of past constitutions on the current document and its relationship with Afghan society and polity. Each of Afghanistan's constitutions of the past is missing important elements that prevented its impact on even the nearest reach of the rural tribal society. The realities of the 2003 Constitutional Loyal Jirga, the manner in which it represented the population, and the language that it codified in Afghanistan's 2004 constitution will therefore have a lasting impact on Afghanistan's future as well as reveal critical policy implications regarding state building.

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## **I. INTRODUCTION**

### **A. PURPOSE**

The purpose of this thesis is to assess the sustainability of Afghanistan's current constitution, signed 28 January 2004. It will analyze the legacy and impact of past constitutions on the current constitution, examine the relationship of Afghan society and polity in relation to the constitution, and appraise the importance of a constitutionally-based legal system for Afghan democratic development.

### **B. IMPORTANCE**

The overarching theme of the *United States National Security Strategy* is to promote democracy around the world, "Our own history is a long struggle to live up to our ideals. But even in our worst moments, the principles enshrined in the Declaration of Independence were there to guide us. As a result, America is not just a stronger, but is a freer more just society."<sup>1</sup> This statement suggests the importance of codified principals as critical foundations in nation-building. Such principals are usually manifested in documents such as declarations of independence or constitutions and act as a sort of litmus test for the long-term success of democratic development. A central proposition of this thesis is that Afghanistan's transition to a stable democracy will be directly related to the principals of its recently ratified constitution. This thesis also assumes that popular support and acceptance by the Afghan people for the constitution will be critical for Afghan democratic development. A written constitution invariably provides answers to questions regarding the makeup of the government such as the election of national leaders, how they govern, and how the people interact with government. In the absence of a constitution, it is reasonable to assume that such dynamics would take years to develop democratically.

If a constitution is defined as "the highest law of the land" then the principles embodied within will help define the larger Afghan society. For Afghanistan, the question is, does a larger Afghan society really exist? Does a Tajik, Hazara, or a Pashtun think of himself or herself as an Afghan first and a member of an ethnic group second? It

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<sup>1</sup> *National Security Strategy of the United States of America*, (Washington DC: The White House: September 2002), 3.

is the central objective of this thesis to determine whether the past constitutions accommodated the problem of sub-national identities. Finally, by posing this question as preamble to assessing the viability of the current constitution, this thesis seeks to assess the impact of constitution making on the long-term stability of Afghanistan.

### **C. PRIMARY THESIS ARGUMENT**

While Afghanistan's current constitution accommodates the multi-ethnic pattern of Afghan society, it provides only a partial solution to the challenges of state building created by multi-ethnic societies. The central purpose of this thesis is to determine the sustainability of Afghanistan's current constitution by analyzing the legacy and impact of past constitutions on the current document and its relationship with Afghan society and polity. This thesis will seek to determine the importance of a constitutionally-based legal system in the development of democracy in Afghanistan. A primary finding of this thesis is that past Afghan constitutions have been formulated explicitly to support regimes rather than address the problems of the fragmentation of Afghanistan into small ethnic, linguistic, familial, and in some cases religious elements. Hence, Afghan constitutions have had a tendency to marginalize Afghan society. The continued ethnic fragmentation of Afghanistan has affected the role that these constitutions have played in impacting societal stability. Each of Afghanistan's constitutions from 1923 to the present is missing important elements that have prevented its impact on even the nearest reach of the rural tribal society.

### **D. CHAPTER SUMMARY**

**Chapter II** will address the comparative case study methodology pursued by this thesis. First, an explanation will be offered as to why the comparative case study method was chosen and why the particular constitutions were selected for analysis. Second, several propositions will be introduced to reveal the manner in which the primary constitutional analysis will be conducted. **Chapter III** will develop the thesis argument by providing a comprehensive review of relevant literature. **Chapter IV** begins the analysis of the constitutions by explicitly focusing on the propositions discussed in the methodology chapter. Each section will begin by painting a brief historical picture and significance of the period leading up to the ratification of each constitution. The propositions discussed in the methodology chapter will be subdivided in order to provide

a clear analysis leading up to the section's concluding remarks including a description of the reality at the time of ratification. The chapter will then conclude with an analysis of all three constitutions by comparing the results of the constitutional processes pursued relative to the key propositions. **Chapter V** assesses the 2004 constitution. This analysis will provide the context of the legacy and impact each had on the present constitution as well as speculate why the 2004 constitution draws so heavily from the 1964 constitution. A concluding section will illustrate implications of this analysis to Afghan state building. Finally, **Chapter VI** concludes with a comparative discussion of the results provided by the propositions discussed in all the constitutions. This analysis will assess the problems Afghan constitution writing has faced, especially regarding sub-national ethnic traditions and centralization of power and offer solutions to this continuing problem.

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## II. METHODOLOGY: A COMPARATIVE CASE STUDY OF THREE AFGHAN CONSTITUTIONS

### A. INTRODUCTION

The central assumption of this thesis is that tribalism and ethnicity are critical factors in Afghan life. Moreover, these societal and cultural factors and dynamics need to be reflected in instruments of governance such as the Afghan constitution. It is further assumed that the inclusion, or at least recognition, of societal and cultural elements will greatly impact the longevity and ultimate success of the constitution. In order to test these assumptions a comparative analysis of three of Afghanistan's constitutions – 1923, 1964, and 1977 – will be presented by this thesis and correlated with the 2004 constitution. The primary analytic question addressed by this thesis is how does the presence or absence of constitutional elements representing societal, tribal, and ethnic dynamics impact on an Afghan constitution's longevity?

The methodology of this thesis is designed to investigate how Afghanistan's ethnic fragmentation has been either marginalized or ignored by the country's constitutions, both past and present, and how this has impacted their ultimate utility. András Sajó suggests the importance of this strategy:

To be able to live in a political society a minimum of collective identity is required, which cannot exist without homogeneity, a kind of community spirit or collective consciousness. A minimum of homogeneity among people is necessary to avoid continuous strife and to tolerate one another.<sup>2</sup>

The methodology of this thesis revolves around systematic case studies of Afghan constitutions and the constitutional processes. The case studies are intended to answer an explicit question: *why after 83 years of constitutional experimentation, has Afghanistan been unable to create a state apparatus that positively reflects and involves an ethnically divided society?* Looking across these cases will reveal each regime experienced similar trends in the desire to modernize and codify a constitution for Afghanistan's future but at the expense of a large portion of Afghanistan's ethnic society. While Afghanistan has had at least seven written constitutions, the method in which the research question will be

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<sup>2</sup> András Sajó, *Limiting Government: an Introduction to Constitutionalism*, (Budapest, Hungary: Central European University Press, 1999), originally published as *Az önkorlátozó hatalom* (Budapest: Közgazdasági és Jogi Könyvkiadó, MTA Állam- és Jogtudományi Intézet, 1995), 24.

answered will be restricted to a comparison and contrast of three constitutions – 1923, 1964, and 1977 – each with important historical contexts. These comparative analyses will serve as a foundation for an analysis of the most recent constitution.

## **B. CONSTITUTIONAL CASE STUDIES**

Each constitution is evaluated in relation to a number of propositions. Specifically the sustainability of each constitution will be correlated to the propositions as well as the constitution's sustainability. Each case will also determine how tribal fragmentation has affected the constitution's capacity to influence societal stability.

The particular constitutions selected for analysis each marked significant periods in Afghanistan's political history. The 1923 version was the first Afghan constitution and thus is an important document in solidifying Afghanistan's position as a member of the international nation-state system. Prior to 1919, Afghanistan was not recognized as a sovereign independent nation among the international community. For almost 100 years prior, Afghanistan was a pawn and buffer state in the "Great Game" played out between the British and Russian Empires.<sup>3</sup> The 1964 constitution is probably the most democratic of all Afghanistan's constitutions and a model for the current constitution. It adopted a bicameral legislature having a lower house (*Wolesi Jirga*) and upper house (*Meshrango Jirga*) to carry out legislative power. This bicameral legislature was unlike earlier constitutionally based legislative authorities, which were merely extensions of the Afghan ruler. The 1977 constitution abolished the monarchy in favor of a single-party presidential system. Hence, this constitution represented a breakpoint in Afghan history. While an apparent reason for adopting this constitution was to rid the country of the excesses of the crown, it essentially shifted these excesses from the crown to the president.

## **C. PROPOSITIONS**

Several propositions presented throughout this thesis will suggest if the codification process was fully representative, if the constitutions were considered supreme but changeable, if sovereignty was distributive, how power and accountability were distributed among the institutions of the state, if individual liberties were fully

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<sup>3</sup> Peter Hopkirk, *The Great Game: The Struggle for Empire in Central Asia*, (New York: Kodansha America, 1994), 123.

distributed, how narrowly defined was the role of Islam,<sup>4</sup> and how much ethnicity played a role.

Constitutions are “codes of rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and offices of government, and define the relationships between these and the public.”<sup>5</sup> Each Afghan constitution will be assessed via this definition and seven key features.

The first feature examined is the constitution’s codification or ratification process. The ratification process pursued by each constitution is important because it is assumed that it will have important implications for the document’s legitimacy. For example:

- Did a truly representative portion of the population ratify the document?<sup>6</sup>

The second key feature of a constitution to be analyzed is its legal status. In other words:

- Where does it fit into the hierarchy of laws?
- Does it truly represent the highest law of the land?
- Is it supreme over ordinary statutory or customary law?
- Is it an amalgamation of tribal and religious law?
- Does it have the ability to be amended and if so, what are the standards?

The third key feature to be analyzed is the distribution of sovereignty afforded by the constitution:

- How is sovereignty, via the constitution, distributed among the population?

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<sup>4</sup> This has valuable implications because it involves not an entirely homogeneous Islamic body but a body, nevertheless, which provides a common bond for the disparity that exists within an ethnically fragmented society. The *Ulama* that Roy refers to encompasses for the most part the dominant Sunni Muslim population. “So long as the state promulgates Shari’a, the *Ulama* is much more concerned with civil society than with the state.” Olivier Roy, *Islam and Resistance in Afghanistan*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 1990), 50.

<sup>5</sup> S.E. Finer, “Notes towards a History of Constitutions,” In *Constitutions in Democratic Politics*, edited by Vernon Bogdanor, (Aldershot, England: Gower Publishing, 1988), 17.

<sup>6</sup> Historically *Loya Jirgas* have played a critical role in the ratification process of Afghan constitutions. Past constitutions have been ratified by *Loya Jirgas* consisting of delegates theoretically representing all regions of the country.

- Conversely, does constitutional sovereignty lie in the hands of the few dominated by a certain ethnic group?

The fourth key feature to be assessed is the constitutions' establishment of institutions of the state. Here the following questions will be addressed:

- How do the constitutions operationalize notions and concepts such as separation of powers (both vertical and lateral) and how wide or accountable they are?
- Are lateral powers separated via presidential or parliamentary systems or are vertical powers separated to include subnational levels of government?
- Is all power tied up at the center or is the government organized around a federal state or is some subordinated power apportioned to separate units such as provinces or a confederal system that relies primarily on the consensus of peripheral units?
- At the central level is there power of impeachment and to whom is it granted?
- Is governmental power limited to a certain tribal unit (i.e. Sadozai Pashtun or Mohammadzai Pashtun or just Pashtun)?

The fifth key feature is identifying the relationship between the state and individuals. This is especially important in a tribally fragmented society such as Afghanistan. Questions to be presented here include:

- Do individual liberties allow for the ability to redress government?
- Is maximum participation allowed in the political process such as participation at the intermediary, sub-national, or provincial levels of government.

The final key features are the role of religion and ethnicity. Questions to be entertained here include:

- Does Islam play a role and is it narrowly defined such as limiting the role only to Sunni Islam or broad enough to permit inclusion of other major Islamic faiths such as the Shi'a?



- What is the degree of presence within the constitution of tribal-ethnic groups?

All of the aforementioned factors and questions will be assessed for each Afghan constitution. These factors will then be qualitatively correlated with variables such as societal stability, government legitimacy and civil unrest. These same factors will be examined relative to the 2004 constitution. Doing this will provide the congruence with the other cases that will predict the longevity of the current constitution.

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### III. LITERATURE REVIEW

#### A. INTRODUCTION

There is considerable literature from fields such as history, cultural anthropology, political science, and constitutional law relevant to the questions raised in this thesis. A primary objective of this literature review is the synthesis of relevant literature from each of these fields in order to provide a meaningful baseline concerning past theoretical and empirical work concerning constitutions and constitutional processes in ethnically divided societies.

The organization of this literature review centers on a series of themes. One such theme is the value placed on the way constitutions are written, the different types of constitutional models that exist in the world, and why constitutions have become so critical for a countries' democratic development. Particular attention focuses on past research concerning Afghanistan's multi-ethnic tribal-centric society.<sup>7</sup> This latter literature would seemingly be instructive in shedding light from a historical perspective on what the future holds for the present constitution, which is based on a presidential model. For example, does the *Jirga*, as a symbolic tribal Afghan institution, have a place in a constitutional role and can it remedy the shortcomings of earlier constitutions and hence offer the perspective of stability to the current regime? A third theme highlights current designs of constitutional models as it pertains to institution building in Afghanistan. This includes a review of constitutional models including western-liberal, Islamic, tribal models or some combination of these. One example is the importance attached to using the 1964 Afghan constitution as a model in drafting the current constitution. For example, what structure did the 1964 constitution offer that other constitutions, such as the 1923 constitution, did not? Afghanistan in 1923, for example, used a western and secular French model for its first constitutional project. This section includes a brief discussion of Islamic constitutional models, as another example, while never attempted as an exclusive state-model for Afghanistan – with the exception of the

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<sup>7</sup> The term described in this thesis is defined using what Olivier Roy describes as a closely-knit group or the *qawm*. This is a sociologically localized community; an endogenous community particularly referred here as a tribe, clan, or extended family. Olivier Roy, *Islam and Resistance in Afghanistan*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 1990), 12.

Taliban regime – all of Afghanistan’s constitutions have recognized the Islamic tradition at varying intensities, thus suggesting the importance of codifying Islamic traditions.

## **B. CONSTITUTIONS AND CONSTITUTIONAL MODELS**

A staggering number of constitutions exist in the world – approximately 160. Over half of these constitutions have been formulated since 1974.<sup>8</sup> This apparent desire to establish a written legal basis as a critical component of state building, particularly after a period of turmoil, has recently caused resurgence among scholars and legal experts to focus on the very idea of constitution writing.<sup>9</sup> A more apparent reason for increased scholarly inquiry is that “recent constitutions are poor instruments of government and the failing of this needed to be addressed.”<sup>10</sup> Before reviewing this literature, however, it is necessary to discuss a number of key definitions that are critical to the analyses that follow.

S. E. Finer defines constitutions as, “codes of rules, which aspire to regulate the allocation of functions, powers, and duties among the various agencies and offices of government, and define the relationships between these and the public.”<sup>11</sup> This definition is of particular interest because it demonstrates the fundamental differences between written constitutions and unwritten ones, which have been the subject of scholarly debates including those that believe constitutional rule of law does not exist if such a “code of rules” is not enshrined in a written document.<sup>12</sup> In other words, constitutions are written codes that define the soul of a nation and fulfill a partial explanation for governments choosing to codify their institutions into a constitution. S.E. Finer articulates the reason for written constitutions, “not just as general reminders, but as a

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<sup>8</sup> Robert A. Goldwin and Art Kaufman eds., *Constitution Makers on Constitution Making: the Experience of Eight Nations*, (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1988), vii.

<sup>9</sup> Irving Leonard Markovitz, “Constitutions, The Federalist Papers, and the Transition to Democracy,” *Transitions to Democracy*, (New York: Columbia University Press, 1999), 42.

<sup>10</sup> Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, (New York: New York University Press 1997), 197.

<sup>11</sup> S.E. Finer, “Notes Towards a History of Constitutions,” in *Constitutions in Democratic Politics*, edited by Vernon Bogdanor, 17-32, (Aldershot, England: Gower Publishing, 1988), 17. See also, S.E. Finer, Vernon Bogdanor, and Bernard Rudden, *Comparing Constitutions*, (Oxford: Oxford University Press, 1995), 1.

<sup>12</sup> Wil Waluchow, “Constitutionalism.” *The Stanford Encyclopedia of Philosophy*. (Spring 2004 Edition). Edward N. Zalta (ed.), <http://plato.stanford.edu/entries/constitutionalism/> (accessed June 14, 2005).

simultaneous signaling device and self-acting sanction for its provisions.”<sup>13</sup> András Sajó points out “A constitution is what it becomes during its life; but if we wish to define it, we must recognize that its creation is of utmost importance, and what happened before its adoption is at least as crucial as its later vicissitudes.”<sup>14</sup> While abstract, Sajó’s critique clearly posits the need to understand written constitutions in the context of the populace, the frontispiece of the nation. Therefore, a comprehensive synthesis of the previously mentioned terms provides the following perspective that guides this thesis. A summary of written constitutions is one that provides a framework for the rules and limits of government power, and expresses sovereignty in a manner that distributes individual liberties equally.

Constitutions need not be written in a single document. Great Britain provides an immediately recognizable example of an unwritten constitution since there is no single written document that represents “The Constitution of Great Britain.”<sup>15</sup> Rather a combination of written historical documents including legal precedents, common laws, charters, and agreements compose the “British Constitution.” Documents such as the Magna Carta (1215), the Petition of Rights (1628), the Bill of Rights (1689), to present day common law, and their associated histories, all spanning a period of over 700 years, form the British constitution. Unfortunately, most countries do not have the luxury of time that Great Britain did in creating an accepted body of law. Emerging states today, such as Afghanistan, are often recovering and rebuilding institutions after years of civil strife and, therefore, often take place in an unstable post-conflict environment.

How states approach constitution-making has been the subject of much academic discourse. Recently, scholars studying post-conflict reconstruction and state building have focused on the process of constitution writing. For example, Andrew Reynolds compares the process of writing constitutions to that of medical science.<sup>16</sup> He argues that, “many constitutional designs have failed because the designers ignored the basics of

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<sup>13</sup> S.E. Finer, “Notes Towards a History of Constitutions,” 21.

<sup>14</sup> András Sajó, *Limiting Government*, 14.

<sup>15</sup> Israel and New Zealand are two other examples of states without written constitutions. Vernon Bogdanor, ed., *Constitutions in Democratic Politics*, (Aldershot, England: Gower, 1988), 2.

<sup>16</sup> Andrew Reynolds, “Constitutional Medicine: Building Democracy after Conflict,” *Journal of Democracy* 16, no. 1 (2005): 54.

good diagnosis and treatment, beginning with the Hippocratic injunction, ‘first, do no harm,’ providing a diagnosis, and offering six hypothetical propositions on which methodological work can proceed in constitutional design.”<sup>17</sup> Herman Schwartz takes a more pragmatic approach in response to the uncertain futures many states face when emerging from conflict. His view is that constitutions should enshrine some means of a formal review of the government structure.<sup>18</sup> A formal review, for example, may exist as a council consisting of all the institutions of government as well as a group of delegates who are representative of the population. The purpose of such a prescribed examination is so that peaceful bargaining can take place between all constituent parts of the nation when faced with realities that may require structural or institutional change. Meanwhile, other scholars argue from a more theoretical point of view. For example, Irving Markovitz recommends a review of the United States Constitution via *The Federalist Papers*. His concern is that recent analysis in democratic transitions has focused too much effort on determining outcomes of authoritarian regimes. While many interesting theories have emerged, he argues that not enough is known, “about the circumstances under which political actors have the power to break free of supposedly deterministic forces to create their own society.”<sup>19</sup> There are, however, plenty of examples that provide the “institutional settings” that were present at the time of transition. For example, he used the *Federalist Papers* to explain the elements of the “institutional setting” of writing a constitution. *The Federalist Papers*, he suggests, explains the constitution in terms of contracting a relationship between state and society. Therefore, the constitution should be instituted as, “a mechanism for participation that promotes a long view, that traps the impatient, and builds hope for the future and not so much directing issues at eliminating abject poverty and extreme inequality, except very indirectly.”<sup>20</sup> Overall, the process in which constitutions are written will provide insights as to the first proposition of this thesis. That is, how consultative and representative they

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<sup>17</sup> Reynolds, 55-57.

<sup>18</sup> Herman Schwartz, “Building Blocks for a Constitution,” *Issues of Democracy* 9, no. 4 (Mar 2004), <http://usinfo.state.gov/journals/itdhr/0304/ijde/schwartz.htm> (accessed 14 June 2005), 1.

<sup>19</sup> Irving Leonard Markovitz, “Constitutions, The Federalist Papers, and the Transition to Democracy,” *Transitions to Democracy*, (New York: Columbia University Press, 1999), 3.

<sup>20</sup> Ibid., 11.

are, and how comprehensive and cautious they are in the review of documents and experiences of the past as well as examples and realities of the present.

Relative to the definition described above, written constitutions enshrine rules meant to limit government powers; make laws or legislate, implement laws or execute, and arbitrate disputes under those laws or adjudicate. It is therefore important to recognize that there are various ways, or models, in which to construct a framework for the rules, limits, and separation of government power. These models are, according to Shugart and Carey, align primarily into two categories of presidential and parliamentary models.<sup>21</sup> A purely parliamentary model, such as that created by the statutory codification of British government is a system in which there is one representative elected by the assembly that acts as an agent of the assembly rather than the electorate. This is in contrast with the presidential model where two separately elected agents, the assembly and the president, act directly on behalf of the electorate. Shugart and Carey pointed out that political practice among nearly all new democracies from the 1970's through the 1990's favored a presidential model even though the academic consensus of the "best" model was to the contrary.<sup>22</sup> The authors set out to explain the apparent preference for presidential models among many newly democratizing regimes. Results revealed an important emphasis on, "the inherent nature of checks and balances in presidentialism when majoritarian rule is opposed and the ability of voters to have the clearest possible choice as to the constitution of the executive."<sup>23</sup> Creating institutions of the state are not simply reserved for the national level. As Sajó points out, the application of separation of powers can be along both lateral and vertical axes.<sup>24</sup> Figure 1 illustrates one way in which this can be aligned. In this example, vertical separation is such that the government is centralized or unitary while all other sub-national levels of government are subordinate to the national level. Lateral separation of powers is displayed at the national level indicating that separation of nation power is divided among three branches while the arrows between the separate branches represent checks and balances. This is not to

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<sup>21</sup> Matthew Soberg Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, (Cambridge: Cambridge University Press, 1992), 2.

<sup>22</sup> Ibid., 3.

<sup>23</sup> Ibid., 54.

<sup>24</sup> András Sajó, *Limiting Government*, 95.

say that a specific combination of lateral and vertical separation must exist as a perfect representation of a democratic institution but rather that, “without the separation of powers, that is, in the case of a homogenous power, it is much easier for the power to become bias and then later on, despotic.”<sup>25</sup>

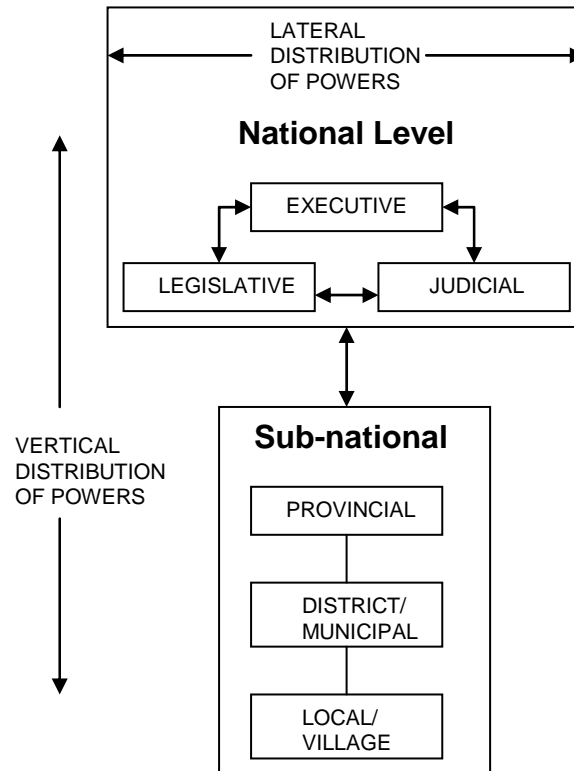


Figure 1. Vertical and lateral separation of powers.

### C. CONSTITUTIONALISM

The meaning and symbolism attached to constitutions have a powerful spirit and can speak to the soul of a nation if that constitution enshrines and reflects the experiences of the society. The soul of a nation, therefore, is composed of the collective past, present, and future experiences of the society and will determine the longevity of any document that is meant to exist as the supreme law of that nation. This is the essence of constitutionalism and according to Sajó, “reaches back beyond Rousseau’s social contract theory in that the constitution is different than ordinary statutes by the fact that it has the

<sup>25</sup> András Sajó, *Limiting Government*, 102.



backing and agreement of a whole people, and is actually, or at least in theory, an acceptable arrangement for all the people constituting a society.”<sup>26</sup>

According to the Stanford Encyclopedia of Philosophy constitutionalism is, “the idea, often associated with the political theories of John Locke and the “founders” of the American republic, that government can and should be legally limited in its powers.”<sup>27</sup> Therefore, constitutionalism is not only tied to the will of the people but is also the basis for the legal limitation of government. Charles Howard McIlwain a revered scholar on the Science of Government offers the antithesis to constitutionalism. Constitutionalism is not “arbitrary rule...it is the opposite to despotic rule, the government of will instead of law.”<sup>28</sup> It is therefore with good intention that states, who want to prevent despotic and arbitrary power in the future, adopt the idea of having a constitution. Perhaps a more liberal-democratic definition of constitutionalism will help put this concept in better perspective. Gerald Stourzh, an Austrian scholar of constitutional history, ascribes three main components to constitutionalism: equal and universal suffrage for full national representation, separation of powers, and the full protection of equality and individual rights under the law.<sup>29</sup> András Sajó, on the other hand, breaks the idea of constitutionalism down to what he considers its basic component by pointing out that constitutions provide a framework for which to forge the relationship between state and society. He argues a consequentialist theory in which “constitutionalism is concerned not solely with the organization of the state but more comprehensively with the organization of state-society relations.”<sup>30</sup> Therefore, the constitution’s legitimacy is tied to its resulting consequences and not in its source. Limiting government, incorporating the people, and preventing despotic rule are necessary but not sufficient components of successful constitutions. Constitutionalism, therefore, is based on societal identities –

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<sup>26</sup> András Sajó, *Limiting Government*, 17.

<sup>27</sup> Wil Waluchow, “Constitutionalism.” *The Stanford Encyclopedia of Philosophy*. (Spring 2004 Edition). Edward N. Zalta (ed.), <http://plato.stanford.edu/entries/constitutionalism/> (accessed June 14, 2005).

<sup>28</sup> Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*, rev. ed. (Ithaca, NY: Great Seal Books, 1947), 22.

<sup>29</sup> Robert A. Goldwin and Art Kaufman, *Constitution Makers on Constitution Making: The Experience of Eight Nations*, (Washington D.C.: American Enterprise for Public Policy Research, 1988), 452.

<sup>30</sup> András Sajó, *Limiting Government*, xi.

both national and sub-national – and the hope that a society will identify itself with the nation through a constitution. This is the intrinsic nature of a constitution and if the constitution fails to identify the link between state and society, than any hope of designing a constitutional government will fail.

Constitutionalism and Islam. Constitutionalism in the Islamic world has developed in a different manner than its western liberal counterpart. Afghanistan's constitutions, in particular, embody an amalgamation of these different histories, events, and objectives (both internal and external). It is, therefore, necessary to provide a separate interpretation of Islamic constitutionalism from that of the previously discussed Western Liberal Constitutionalism. One way to assess the evolution and impact of Islamic constitutionalism is to review the works of several Islamic revivalist thinkers of the nineteenth and early twentieth centuries. Islamic philosophers such as Sayyid Jamal al-Din al-Afghani, Sayyid Abu'l-A'la Mawdudi, and Hasan al-Banna have provided widespread and popular discourse on the state of Islam and its relationship to people and institutions of power. Seyyed Vali Reza Nasr, a highly respected Islamic scholar, has provided a complete textual analysis of one these Islamic thinkers, Sayyid Abu'l-A'la Mawdudi. Mawdudi is particularly important to understand because his visions of an Islamic state are compatible with many of the Muslim constitutions that exist today, which also express the heritage of western constitutional designs. Mawdudi's vision of an Islamic state was preoccupied with constitutionalism and included the state sanctioning of the religion.<sup>31</sup> Primarily responding to the effects of modernity at the time, Mawdudi believed modernity was not a bad thing, as long as it was Islamic. He was not troubled with accepting western notions of governing institutions more than he was with the secular notion of governance. His essential principle was to take the fruits of modernity, even if this meant accepting a western framework of government, and placing an Islamic umbrella over that framework. Mawdudi was intent on the idea that society should be firmly rooted in Islam; in other words, an Islamic identity would provide legitimacy for an Islamic state apparatus. While Mawdudi's conception of Islamic constitutionalism is only one representation of many Islamic political conceptions

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<sup>31</sup> Seyyed Vali Reza Nasr, "Mawdudi and the Jama' ai-i Islami: The Origins, Theory and Practice of Islamic Revivalism," in *Pioneers of Islamic Revival*, edited by Ali Rahnema, (London: Zed Books, 1994), 106.

of the state, it provides an important backdrop in understanding why most Muslim states choose to codify Islam in their constitutions. To illustrate this point, Afghanistan's past constitution writing experiences have not only produced constitutions that enshrined Islamic jurisprudence but combined this within a primarily western liberal constitutional framework.<sup>32</sup> While Mawdudi explained a model of an Islamic state, Asta Olesen's primary thesis concerning constitutionalism in Afghanistan, rested on the concept of legitimacy. She asserted that state power, initially based on a tribal model of legitimacy, eventually gave way to the effects of modernizing reform projects. After the first constitution was drafted, the legitimizing source of authority rested solely with Islam but this authority eventually eroded by the time the fourth constitution was ratified in 1977. She further asserted that at no time did Islam ever disappear in the language of the constitutions.<sup>33</sup> To be sure, Islam appears in every constitution and plays various roles in defining the state and determining the rule of law. Thus, the importance of Islam in the Afghan constitutions cannot be ignored and as a proposition of this thesis will be analyzed for the extent to which it is codified in the constitutions.

Afghanistan's case provides an interesting study in the constitution-writing experiment of a deeply religious and ethnically fragmented state. Ethnic and religious identities, the forces of Afghan society, were present over 100 years ago and have not changed even after several constitutions have attempted to change them. Therefore, analyzing the content of each of the constitutions studied in this thesis will provide insights as to whether Afghanistan's current constitution has adapted to these persistent forces of society. Before any analysis begins, however, it is necessary to provide a thorough description of Afghanistan extremely fragmented society. The next section will attempt to shed light on this dynamic and why it plays such an integral role in Afghan politics.

#### **D. A TRIBAL-CENTRIC SOCIETY**

Afghanistan is an extremely ethnically diverse country. In a report written for the Minority Rights Group, Nassim Jawad, focused on ten of Afghanistan's largest minority

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<sup>32</sup> The Afghan Constitution of 1977 proved to be a fatal exception to this experience.

<sup>33</sup> Asta Olesen, *Islam and Politics in Afghanistan*, (Richmond, Surrey: Curzon Press Ltd., 1995), 299-301.

ethnic groups<sup>34</sup> but acknowledged the existence of between 16 and 57 ethnic groups anytime throughout history.<sup>35</sup> Moreover, this diversity has, in part, caused much of the internal strife that has dominated the country of the last hundreds of years. Roughly correlated with Jawad's analysis, Figure 1 illustrates the largest ethnic groups constituting the majority of Afghanistan's population.

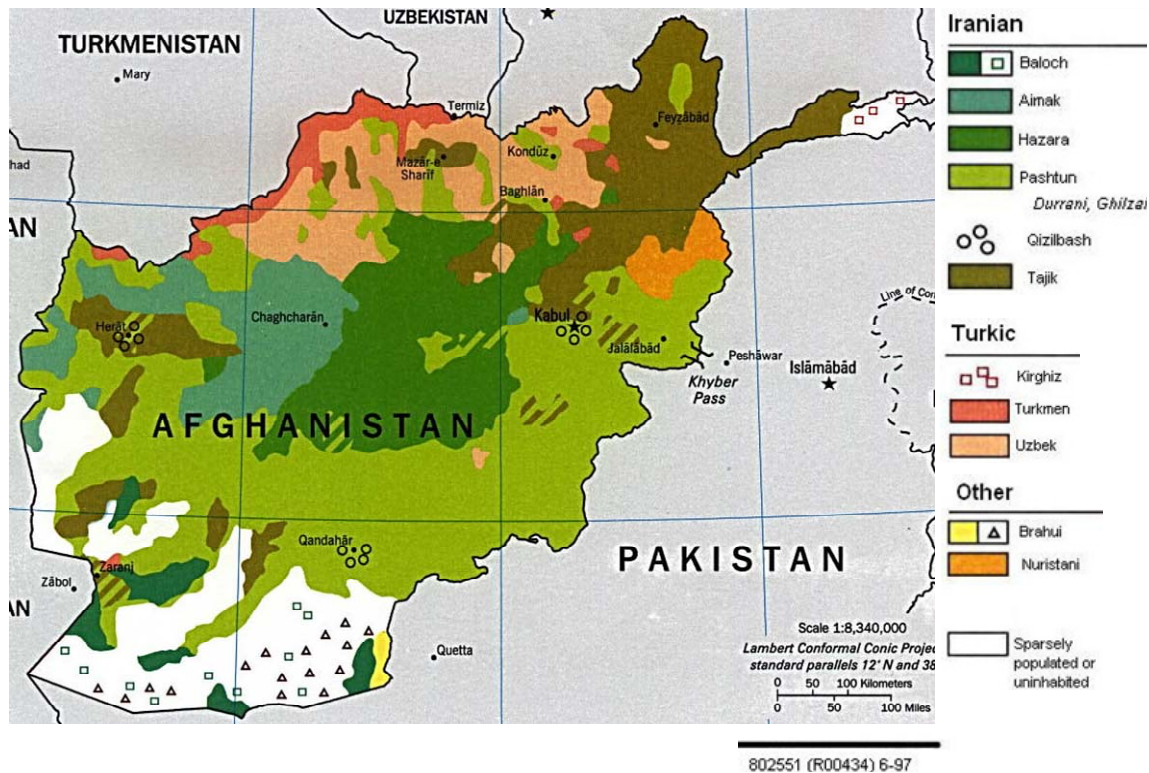


Figure 2. Ethno-linguistic Map of Afghanistan.<sup>36</sup>

Olivier Roy has suggested that while tribal and religious customs and governing structures form the bedrock of Afghan stability, tribal code and personal faith are often in competing social and political spheres and at odds with one another.<sup>37</sup> The tension between tribal code and personal faith also created difficulties resulting from the language present in Afghanistan's constitutions. For example, nearly all of Afghanistan's

<sup>34</sup> No single ethnic group equals a majority of the population. The largest group, the Pashtuns make up approximately 40 percent of the population of Afghanistan.

<sup>35</sup> Nassim Jawad, *Afghanistan: A Nation of Minorities*, (London: Minority Rights Group, 1992), 6.

<sup>36</sup> Map available from the University of Texas online at [http://www.lib.utexas.edu/maps/middle\\_east\\_and\\_asia/afghanistan\\_ethnoling\\_97.jpg](http://www.lib.utexas.edu/maps/middle_east_and_asia/afghanistan_ethnoling_97.jpg) (accessed March 2006).)

<sup>37</sup> Olivier Roy, *Islam and Resistance in Afghanistan*, 62.

constitutions have either marginalized or ignored the issue of tribalism (tribal identities, customs, or codes). In order to be viable, any Afghan constitution must incorporate rather than undermine or oppose these societal issues.

While Afghanistan has had written constitutions for nearly 100 years, long-standing unwritten rules or social rules, especially at the tribal level, have been operational for a millennium and many argue are just as precise and often more rigid than any written constitution. In 2004, the International Legal Foundation conducted a wide-ranging analysis of Afghanistan's customary laws. The finding of the study revealed that the customary laws, practiced by the tribes in the region around Afghanistan for over a thousand years, are actually very similar in that all revolve around the *jirga*, or council. A form of tribal code or customary law in Afghanistan predates even the influence of Islam, which made its way to Afghanistan by the ninth century. It was through these tribal laws or unwritten codes that formed the bedrock of the traditional Afghan legal system.<sup>38</sup> This customary law served as the foundation of primary community administration up to the first constitution and continues today.

Several examples follow, which illustrate the similarity among these customary legal structures. *Pashtunwali*, a familiar tribal code of the region, pertains to the largest ethnic group, the Pashtuns. This tribal code, which revolves around the tribal assembly or council (*jirga*), has historically driven Pashtun interactions in an around southern Afghanistan. In addition to the Pashtuns, tribal codes exist among most of the ethnic groups present in Afghanistan. Similar tribal councils exist among the ethnic Hazara tribes that make up central Afghanistan. These tribal councils are referred to as *Maraka*.<sup>39</sup> In the far Eastern region of the Hindu Kush mountain range, there is the Nuristan province where there exist two levels of *jirgas*, the lower or *Awra* and the upper or *Landhyar*.<sup>40</sup> In the north, which is remarkably more ethnically diverse than the more

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<sup>38</sup> Before Afghanistan became a nation-state, the only resemblance it had to an autonomous area was the relationship between the tribes bound geographically south of the river Oxus (*Amu Darya*) and north of the river Indus, later the "Durand Line." During times of crisis, these tribes would come together and form a grand council or *Loya Jirga*.

<sup>39</sup> International Legal Foundation, "The Customary Laws of Afghanistan: A Report by the International Legal Foundation," September 2004, [http://www.theilf.org/ILF\\_cust\\_law\\_afgh\\_10-15.doc](http://www.theilf.org/ILF_cust_law_afgh_10-15.doc) (accessed May 2005), 12.

<sup>40</sup> International Legal Foundation, 19.

homogeneous south where the Pashtuns dominate, there are at least three types of councils known as *Shura-Eslahi*, *Jirgas*, and *Mooke-Jamaat-Khana*.<sup>41</sup> All of these tribal assemblies or councils perform similar tasks in that they act as sort of legislative, judiciary, or decision making bodies that will ultimately affect how tribal leaders conduct business both within and without tribe, especially during times of crisis.

Tribal councils are also characterized by the approach in which justice is carried out. Virtually all of the tribes of Afghanistan, for example, carry out a form of “restorative justice”<sup>42</sup> that includes either an apology (*nanawati*) and a fine or just an apology. The fines are usually in the form of blood money called *poar* in Pashto, *jarima* among the Hazara, *nagha* in the Nuristan region, and even in the ethnically diverse north, there is some system of fines as punishment among each tribe. This is quite unlike the Western form of justice, which is based on retribution and involves some sort of jail or prison sentence.<sup>43</sup> What is meant here is that any attempt to re-interpret or alter this traditional form of justice would require widespread change of traditional attitudes, beliefs, and behavior. The aforementioned description of this *Loya Jirga* is as close to an uncoded or unwritten example of a constitution as Afghanistan’s history will permit.

Afghan Ethnic and Social Fragmentation. Societal Fragmentation in Afghanistan is pervasive and presents a significant set of problems for governance. Afghan fragmentation is a historical legacy “since the structure of society in Afghanistan has not been undermined by colonialism.”<sup>44</sup> Critical for Afghan development, was the social control and collective action centered on the *khan*.<sup>45</sup> Khans are critical in Afghanistan, for the entire *jirga* system, especially during times of crisis. Nevertheless, what does this similar form of community administration have to do with the fragmentation of society within Afghanistan? As Olivier Roy explains in the first chapter of his book, *Islam and Resistance in Afghanistan*, this fragmentation emerges first into two large realms, the countryside and the state bureaucracy or the province and the town. Each holds a mutual

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<sup>41</sup> International Legal Foundation, 27-28.

<sup>42</sup> Ibid., 6.

<sup>43</sup> Ibid., 6.

<sup>44</sup> Olivier Roy, *Islam and Resistance in Afghanistan*, 3.

<sup>45</sup> The *khan* is the leader of the *qawm*. Barnett Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, 2<sup>nd</sup> ed. (Yale: Yale University Press, 2002), 41.

contempt for the other. The town is the realm of “change” or progress and the province is the realm of the “unchanged,” or tradition. The glue that holds these two realms together is politics.<sup>46</sup> Roy further breaks this down to realms that are between that of urban society and the society of the countryside and he argues that the constant interaction between these social groups has gradually worn away society in the countryside. Since the town is the realm of “change” or progress, it is only natural to accept that change as part of a continuous resilient process. In other words, it is much easier to integrate into the towns than it is to integrate into the provinces. In the countryside the fragments are scattered, varied, and numerous, making integration or subjection much more difficult. Familial lineage, ethnicity, spoken language, tribal codes, and Islam are center to the way of life. But it is often these same kinds of things that come in conflict with one another for various reasons. Barnett Rubin goes further with this analysis by asserting that when the state began seeking external resources to maintain its independence it thus became weaker and to compensate for this, formed a large patronage network with the khans through ties of kinship. This support kept the khans from forming larger tribal coalitions that could threaten the state’s legitimacy.<sup>47</sup> Therefore, the “leaders encouraged further fragmentation of the society...thus defining ‘traditionalism’ and ‘localism’ as results of the countries forced integration into the contemporary state system.”<sup>48</sup>

Afghanistan’s constitutional history has enshrined the *jirga* concept into a separate institution, but at the same time, enshrining the Pashtun familial lineage and spoken language has curtailed the traditional significance of the *jirga*, thus ignoring a significant ethnic portion of the population. In addition to enshrining the Pashtun lineage, the state curtailed the effects of tribalism by giving more attention to Islam in the writing of the constitutions.<sup>49</sup> As we shall see, the next section will explore literature that has focused on Afghanistan’s constitution writing projects of the last 100 years.

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<sup>46</sup> Olivier Roy, *Islam and Resistance in Afghanistan*, 11.

<sup>47</sup> Barnett Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, 2<sup>nd</sup> ed. (Yale: Yale University Press, 2002), 20.

<sup>48</sup> Ibid., 15.

<sup>49</sup> Olivier Roy, *Islam and Resistance in Afghanistan*, 15.

## E. INSTITUTION BUILDING IN AFGHANISTAN PAST AND PRESENT

State structures existed prior to the beginning of the great constitutional period in 1923, but this legitimating process was wrapped around tribal traditions. Asta Olesen provides one explanation for the nature of the Afghan state based on this transmission for legitimating power. The argument highlights two models of state legitimation that have dominated the Afghan political landscape for centuries. First, the tribal model was a means of legitimacy that predated even the first constitution.<sup>50</sup> The tribal model provided the ultimate source of authority, Allah and the Prophet, a conduit mediated by the tribes via the institution of the *jirga* through which the *Amir* could rule.<sup>51</sup> The Islamic model, on the other hand, provided the ultimate source of authority, Allah and the Prophet, and served as a conduit mediated by the *ulama* through which the *Amir* could rule.<sup>52</sup> Therefore, in order to understand the way in which Afghanistan has carried out institution building, it is important to understand the conflicting nature that Islam and tribalism have played in legitimizing central authority.

The two models of state legitimation have not always provided the legitimating source of state authority. Olesen points out that each constitutional experiment has either adapted or rejected these models as sources of legitimacy. The language in the first constitution, for example, was influenced by Amanullah's desire to "modernize" Afghanistan as well as his fascination with all things "Western." Hence, the King's travels to Europe, his own personality, as well as the influence of thinkers of the Islamic modernist movement greatly influenced the development of Afghan's first constitution. Olesen argues that tribal influences were no longer at the forefront of legitimizing the state and describes the wave of pan-Islamism as an expression of Afghanistan's constitutional ideals.

Much of the pan-Islamic ideas that provided constitutional influence came from Mahmud Tarzi, a prominent Afghan member of the Islamic modernist movement. Much

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<sup>50</sup> It is important to note, for purposes of explaining the lineage of the models of legitimation of power beginning in the nineteenth century that Islam had already been firmly rooted in Afghanistan since before the Mongol invasion in the thirteenth century.

<sup>51</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 34. It is also important to point out that the context in which the *Jirga* was used was based on the Pashtun tribal alliance that brought the Pashtun Durrani's to the forefront of Afghan power in the 18<sup>th</sup> century.

<sup>52</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 10.



like Mawdudi and al-Afghani before him, Tarzi was not against emulating the way in which the west modernized but modernizing on purely Islamic terms was what was most important to him.<sup>53</sup> The Young Afghans, an Afghan modernist movement, interestingly referred to as the *Mashrutiya* (constitutional group), and Tarzi through a close association to the King, influenced the drafting of the new constitution. All of these influences caused the tribal model to lose much of its significance as a legitimizing influence.<sup>54</sup> While the Islamic model still held much sway,<sup>55</sup> it was not until after the fifties, that the *ulama* became dissatisfied with the state's shift in legitimizing their power with something other than Islam. After the 1964 constitution, the models for legitimation changed dramatically and no longer focused on Islam or tribal legitimacy. The ultimate source of authority was no longer Islam; it was instead the nation, mediated by the King, for which the Parliament could rule.<sup>56</sup> By 1977 however, legitimation was further distorted. The people, represented by the *Loya Jirga* became the ultimate source of authority, mediated by the president, through which the *Melli Jirga* or Party could rule.<sup>57</sup> Unfortunately, after 1992, the various *mujāhidīn* groups attempted to make the state more in-line with mores of Islam, but the groups differed greatly on how this could be accomplished.<sup>58</sup> The lack of congruence across *mujāhidīn* groups lead to a brutal civil war and the near complete political collapse of the system.

While the models discussed above offer explanations as to how various Afghan states legitimized their power, the models do not answer the primary reason for the failures of these constitutions. Literature on Afghanistan's history with constitution writing is sparse and much of the data required for such studies has been inhibited due to the destruction of valuable historical data after so many years of conflict in the country. One fact is clear however. Past constitutions have indeed affected the current

<sup>53</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 117.

<sup>54</sup> Ibid., 122.

<sup>55</sup> Islam was still considered the legitimizing force in the writing of the 1923 constitution. But the effects of modernizing policies and westernized language had been much of the basis for the Khost rebellion. This led to several amendments to the constitution that essentially reversed some liberal elements and included a more narrow description of Islam. Hence, Article 2 was amended to add the Hanafite tradition as well as require Hindu's and Jews to pay a special tax and wear distinctive clothing.

<sup>56</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 207.

<sup>57</sup> Ibid., 223.

<sup>58</sup> Ibid., 303.

constitution writing process in Afghanistan. Nighat Mehroze Chishti in the most comprehensive comparative study regarding Afghanistan's previous constitutions has offered the following primary thesis as to the failures of the constitutions of 1923, 1931, 1964, and 1977.

Though the Afghan rulers tried honestly to modernize the political system in Afghanistan and to give it a democratic touch, at the same time they did not share their powers with the people open-heartedly...the success of any constitution not only depends on the people who execute it, but it should be according to the nature and mood of the people to be ruled by it<sup>59</sup>

Power sharing, representative-government, and individual liberties are all essential principles enshrined in democratic constitutions. Chishti's argument is that Afghan leaders have not lived up to their good intentions and enshrined such concepts in the constitutions they created. The problem of centralization and lip service to traditional tribal and religious institutions have led to discontent between government and the populace and in turn resulted in Afghan societal instability.

A wide array of literature regarding the 2004 constitution focuses primarily on theoretical models of constitutional design prior its ratification. The literature regarding the final ratified version while limited offers a comprehensive review of the Constitutional *Loya Jirga*. Afghanistan's present constitution supports a highly centralized presidential system, as have constitutions of the past. Some critics suggest that presidential centralization is poorly adapted to Afghan realities, which would better accommodate either a federal republic or a parliamentary system.<sup>60</sup> Carol Riphenburg, offers a dissenting view: "Presidentialism offers a clear hierarchy, an obvious line of authority, thought crucial to maintaining order in Afghanistan's fractured political environment. Not providing for a prime minister precludes any rival for executive

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<sup>59</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, (Karachi, Pakistan: Royal Book Company, 1998), 161-162.

<sup>60</sup> Henry E. Hale, "The Federal Option for Afghanistan," *Policy Brief* (New York: EastWest Institute) 1, no.7 (November 2002): 7. Another recommends a unitary system: Bereket Habte Selassie, *The Constitution of Afghanistan: Structure of Government and Center Periphery Relations*, Center on International Cooperation, New York University. <http://www.cic.nyu.edu/pdf/E12GovtStructureCenterPeripheryRelationsSellassie.pdf> (accessed April 15, 2005). Finally, Roashan does not explicitly favor a federal system for Afghanistan but points out that a provincial system that has been in use since the mid-18<sup>th</sup> century shows similarities to a federal system: Dr. G. Rauf Roashan, "Pros and Cons of Federalism in Afghanistan" The Institute for Afghan Studies, <http://www.institute-for-afghan-studies.org> (accessed May 02, 2005).

authority.”<sup>61</sup> However, a closer look at federalism may offer an alternative option for an ethnically fragmented society such as Afghanistan. For example, Nancy Bermeo argues, “federalism provides more layers of government and thus more settings for peaceful bargaining”<sup>62</sup> for states such as Afghanistan. As far as the constitution providing long-term stability, there are some scholars who believe that Afghanistan, “may be off to a good start with the adoption of the 2004 constitution, but it seems likely that a revision will be necessary in five to ten years.”<sup>63</sup> Others seem pessimistic about the ideals of the constitution paired with the current realities that face Afghanistan and its people as a whole.<sup>64</sup>

The 2004 constitution specifically addresses the importance of human rights – due primarily to the explicit language laid out in the Bonn Accords, the roadmap for Afghanistan’s future after the defeat of the Taliban regime by the Northern Alliance with the aid of an international coalition.<sup>65</sup> While the constitution defines the role of the people as individuals and their relationship to the state, the issue of local governing customs is ignored, marginalized, and otherwise missing within the text. This is problematic because local governing customs and structures play an active and vital role in Afghanistan’s civil society. The “*qawm*”<sup>66</sup> in many ways acts as an individual governing body in Afghan society where loyalties lie not with the central government but with the local family or village structure. As a result, part of the analysis of this thesis is to determine if the present constitution fully integrates these units or structures within a national identity or if will be similar to failures of the past.

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<sup>61</sup> Carol Riphenburg, “Afghanistan’s Constitution: Success or Sham?” *Middle East Policy* 12, no.1 (Spring 2005): 35.

<sup>62</sup> Nancy Bermeo, “The Import of Institutions: A New Look at Federalism.” *Journal of Democracy* 13, no. 2 (April 2002): 99.

<sup>63</sup> Barnett Rubin, “Crafting a Constitution for Afghanistan,” *Journal of Democracy* 15, no.3 (July 2004): 19.

<sup>64</sup> Failures in state-building render a constitution meaningless regardless of all democratic and representative intentions; Carol Riphenburg, “Afghanistan’s Constitution: Success or Sham?” *Middle East Policy* 12, no.1 (Spring 2005): 43.

<sup>65</sup> More specifically, part II of the “Legal Framework and Judicial System.” United Nations, *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*, (Bonn, Germany: United Nations Security Council, December 2001).

<sup>66</sup> See footnote #7.

Given the variety of literature and theoretical concepts that have guided the research regarding this topic and in keeping with the propositions suggested by this thesis, the following assumption is put forth for the success of the 2004 constitution in light of past constitutional experiments. The Constitution must exemplify a representative portion of the people who are given the opportunity to participate in the creation of the document that represents the supreme law of the land. As a representation of the will of the people, they have the power to change it due to its imperfect nature, but not without checks and balances inherent in the institutions they created. The formulation of this must be careful not to infringe on individual freedoms as well as the religious and tribal customs that forge an extremely important part of their existence.

## IV. CONSTITUTIONAL ANALYSIS

### A. INTRODUCTION

While the history of the Afghan “state” can be traced from the time of Ahmad Shah Durrani, the notion of an “Afghan” nation is still problematic. It is a concept that has often been at odds with how an individual Afghan views himself within the hierarchy of identities with other social groups.<sup>67</sup> The only political outlet that has historically connected society with the state is through the tribal confederation<sup>68</sup> and this has only been used to the extent of carrying out the interests of the dominant tribal legacy. The concept of a tribal confederation has since become enshrined in the temporal institutional powers stated in the constitutions. This chapter will provide an analysis of the constitutions by providing a brief historical picture, followed by an in-depth discussion of the propositions discussed in earlier chapters, and conclude with a discussion of the comparative results of these propositions.

### B. 1923 CONSTITUTION

The 1923 Constitution of Afghanistan was written during a period of significant cultural and political reform. During this period, the concept of the Afghan “nation” was in great flux. For example, the periphery or Afghan rural dwellers (the vast majority of the population) only identified with the country center in terms of a religious perspective, believing they were surrounded by infidels and unbelievers – a product of being a buffer state and pawn in the “Great Game” played out by the super powers of the European and Asian Continents.<sup>69</sup> The drafting of the 1923 constitution was also a period when Afghanistan became a sovereign and independent country. This independence while recognized by the world was not necessarily recognized by Afghans.<sup>70</sup> Provincial Councils, a key component of independence, were only considered advisory bodies and the King directly appointed half of the membership in these councils.<sup>71</sup> Many of these

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<sup>67</sup> Refer to footnote #7 and the *qawm* concept.

<sup>68</sup> Olivier Roy, *Islam and Resistance in Afghanistan*, 13.

<sup>69</sup> Ibid., 17.

<sup>70</sup> Afghanistan was the first Islamic country to join the League of Nations.

<sup>71</sup> “The Constitution of Afghanistan April 9, 1923,” text from Afghanistan Online, *History: Constitutions of the Past (1923)*, <http://www.afghan-web.com/history/const/const1923.html> (accessed April 2005). Art. 39.

appointments consisted of high-ranking civil servants who had already been co-opted by the government.<sup>72</sup> Moreover, the rule of law was still very archaic with the official establishment of a state judiciary on a temporary basis only for the use of settling disputes within the government.<sup>73</sup> Article 2 of the 1923 Constitution, for example, was amended to add the provision that “Hindus and Jews must pay the special tax and wear distinctive clothing” and actually reversed codified freedoms.

The ascendancy of Amanullah Khan as the new Amir of Afghanistan began a journey of Afghanistan towards constitutionalism and nationalism. This journey had close and profound linkages with the political evolution of the post-Ottoman period in Turkey. Amanullah recognized the need to bring Afghanistan into the modern world by forcibly defining itself as a modern nation-state on Western terms. He also believed that Afghanistan could identify with the politicizing process of its Muslim brethren to the West.

The ratification of the 1923 Afghan constitution represented a significant and historic event. Between the years 1919 and 1923 Amir Amanullah Khan, with the aid of French and Turkish advisors, achieved what his grandfather Amir Abdur Rahman Khan (1880-1901) had only hoped for during his entire 21 years of rule – the establishment of a constitutional government.<sup>74</sup> Between 1922 and 1923, the council and government worked diligently to promulgate legislation that would embody the “Constitution of Afghanistan,” or *Nizāmnāma-i Asasi-e Daulat-e `Aliyah-e Afghanistan*.<sup>75</sup>

Table 1, below, represents the outcome of the key propositions of this thesis. Negative annotation, beginning with the codification process, shows that Afghanistan’s initial constitution played virtually no role in creating a constitutional state. It was a mere mechanism for codifying the government administrative apparatus and legitimizing the King’s right to rule. The desire to secularize and remain faithful to Islam created a dual means for legitimation, causing a certain amount of dysfunction in codifying principles.

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<sup>72</sup> 1923 Constitution, Article 47.

<sup>73</sup> Ibid., Article 56.

<sup>74</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, (Karachi, Pakistan: Royal Book Company, 1998), 19.

<sup>75</sup> Ibid., 21.

The *Loya Jirga* was not entirely representative and therefore meant little in terms of its use as a legitimating tool. While a negative value is associated with the constitution's failure in defining its supreme nature, a positive value is associated with the difficulty in which amendments were proposed and ratified by the King. Additional negative annotations show that sovereignty was not fully distributive, the King failed to devolve the power of the monarchy and no accountability was established. Negative annotation further demonstrates that the King had absolute power as the final arbiter for enactment of law and granting of individual privileges and virtually ignored the presence of the tribal fragmentation of the countryside. Islam was firmly codified, but a double positive annotation shows that it was very narrowly defined and left out a large portion of the population. The next section begins by discussing the process by which the constitution was codified.

	Codification	Legal Status		Sovereignty	Institutions		Individual	Religion		Ethnicity
	Representative?	Supreme? Amenable?		Fully distributive?	Power Distribution? Accountability?		Relationship with the state?	Codified? Narrowly?	Degree of Presence	
1923 Constitution	--	-	+	-	-	-	-	+	+	-

Table 1. 1923 Constitutional Factors.

## 1. Codification

In deciding to draft a constitution for Afghanistan, Amanullah sought the council of French and Turkish advisors. His primary advice however came from a Young Turk<sup>76</sup> named Badri Bey and the Turkish constitutional model – a fledgling document itself – became Amanullah's constitutional model. A fledgling constitutional government is hardly something that an advisor would expect to be a good model to emulate. In addition to seeking external advice Amanullah decided to form a *Loya Jirga* supposedly for the purpose of providing tribal legitimacy to the document. However, this council was shrouded in mystery. One scholar, through pure academic deduction believes a *Loya Jirga*, which took place in 1921, produced the 1923 Constitution. The validity of this

<sup>76</sup> The Young Turks were a group of Ottoman officers who, in 1908, led a revolution to establish a constitutional democracy and later in 1919 abolished the Ottoman Empire and ended the Islamic Caliphate.

deduction, however, is not easy to prove because of the difficulty encountered in translating the documentary evidence.<sup>77</sup> Other scholars more interested in the document itself reached the same conclusion by merely assuming that the *Loya Jirga* or The Assembly of Elders took place. On the contrary, the *Loya Jirga* that apparently gathered in Jalalabad, by edict of the Amir, to draft a constitution, alone revealed the importance of this body. The *Loya Jirga*, presided over by the Amir, therefore demonstrated that the intention for holding the meeting itself was part of a systematic tradition in order to gain consensus among important Pashtun tribal leaders that would affect the whole of the realm. In attendance at the *Loya Jirga* were Northeastern Pashtuns from the Nuristan region, particularly from the Ghilzai tribe, the king's ethnic tribe, as well as people from the Jalalabad region and, themselves, primarily Pashtun in essence.<sup>78</sup> One of the primary reasons for this was not only that this was close to the homeland of the Amir but that the areas North of Kabul had grown increasingly resistant to the reforming policies already undertaken in the years previous.<sup>79</sup> It stands therefore that while Amanullah was following a long held tradition through gaining consensus in a *Loya Jirga*, in order to draft a legal document to bind the whole of Afghanistan, he did this primarily using elements of his own kin group. As a result, the legitimacy of the document came under harsh scrutiny since it did not reflect a representative proportion of the ethnically and tribally diverse society.

## **2. Legal Status**

Statutes were codified during Amanullah's reign at a staggering pace and reveal the astounding number of complexities of enacting an entire legal code in a relatively short period. The sixty-four legal codes listed in Poullada's book are perhaps a small sample of all the laws enacted during Amanullah's reign, totaling a reported four volumes.<sup>80</sup> The actual existence of the constitution was also shrouded in mystery, after

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<sup>77</sup> Leon B. Poullada, *Reform and Rebellion in Afghanistan, 1919-1929: King Amanullah's Failure to Modernize a Tribal Society*, (Ithaca, New York: Cornell University Press, 1973), 93.

<sup>78</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, (Karachi, Pakistan: Royal Book Company, 1998), 21.

<sup>79</sup> Martin Ewans, *Afghanistan: A New History*, (Richmond, Surrey: Curzon Press, 2001), 92.

<sup>80</sup> Leon B. Poullada, *Reform and Rebellion in Afghanistan*, 99.



having been found in a Kabul bookseller's bazaar.<sup>81</sup> In this sense, part of the confusion of the origin of the constitution becomes clear since it bore the same title, *Nizāmnāma*, as other legal codes did. These legal codes were produced into a series of individual booklets, the drafts of which, aided by the French and Turkish jurists, became the "first comprehensive legal code in Afghanistan."<sup>82</sup> The real framework for the basic organization of government lay within these codes, particularly the statute for the Basic Organization of Government or *Nizāmnāma-e Tashkilat-e Asasiya-e Afghanistan*.

The legal nature of the constitution is also unclear. There is no article proclaiming the constitution to be the supreme law of the land and no establishment of a hierarchy of laws. Instead, matters pertaining to laws and the courts as laid out in the Constitution refer to the *Nizāmnāmas*. The peculiarity of this feature becomes more bewildering in Article 69, which prevents the cancellation or suspension of the constitution for whatever reason. This means that the *Nizāmnāma* laws were the binding feature of the constitution and that they could not be canceled or suspended.

Another feature of the legal nature of a constitution is its amenability. By all standards, this test is an essential element of a constitution and most constitutional scholars argue that a constitution should be difficult to amend.<sup>83</sup> While Article 70 of the 1923 Constitution declares the amenability of the constitution and seems rigorous in nature, Article 41, however, reveals that the king had the power to appoint half of the state council. This is the very council responsible for amendments. In reality, amenability, therefore, rested in the hands of the King, rather than the people, represented by the state council.

### **3. Distribution of Sovereignty**

According to the 1923 constitution, Afghan State sovereignty was not inherited by the nation; rather it was pledged, on behalf of the King to rule in their stead.<sup>84</sup> In the

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<sup>81</sup> An English version of this document was never made. Apparently the draft, written in Pashto, was only later translated in the Persian and the 1931 Constitution never even mentioned its existence even though many of its provisions were reportedly used in it. This interesting account of the discovery of the 1923 Constitution of Afghanistan can be found in, Leon B. Poullada, *Reform and Rebellion in Afghanistan*, 93.

<sup>82</sup> Leon B. Poullada, *Reform and Rebellion in Afghanistan*, 94.

<sup>83</sup> András Sajó, *Limiting Government*, 39.

<sup>84</sup> 1923 Constitution, Article 4.

classic western notion of sovereignty, this was a contract, and it was perfectly legitimate but “according to John Locke, a contract between the King and the people, did not mean a complete resignation of rights.” Article 4, however established a dual sovereignty in that the King was bound to, “rule in accordance with the principles enunciated in the Shari’a...and remain faithful to the nation.” This language was primarily a combination of Amanullah’s exposure to western and secular constitutional models as well as ideas related to Islamic modernism, the Islamic state model, and his own personal faith in Islam. Seeking authority in two bodies, however, created a conflict of interest. In other words, how can sovereignty rest with both the people and with Allah? The duality of sovereignty created by the language in Article 4 caused great criticism, especially among his chief supporters, Mahmud Tarzi. Influenced also by the Young Turk movement and the secular political developments in Turkey, Amanullah wanted power to rule legitimately through the nation and he wanted this integrated into the constitution. Ultimately, the codification of secular and religious laws, without a clear line of authority, priority, or precedent essentially created a challenge between the Islamic qualities of “the believer and the *umma* and the concepts of citizen and society.”<sup>85</sup>

#### **4. Relationship Between the Institutions of the State**

Prior to 1919, the office of the King was the only institution of state power. There were other administrative offices commissioned by the king in order to run the day-to-day business of government. Therefore, the relationship between any other institutions and the king was one of subordination. This became a significant aspect in the new constitution because it marked a dramatic shift from the centralizing tendencies of the monarchy to the specific enumeration of powers that essentially divided power between the king, the council, and the judiciary.

##### ***a. Separation of Powers***

Power sharing in the first Afghan constitution was limited to non-existent. The extent of any exercise of power outside the purview of the king was, “vested in the council of ministers and independent departments (*idarah-ye-mustaqel*)”<sup>86</sup> and this was to serve a purely administrative function. The council of ministers served this

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<sup>85</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 123.

<sup>86</sup> 1923 Constitution, Article 25.

administrative function by formulating foreign and domestic policy, which incidentally the king presided over as the council “chairman.”<sup>87</sup> In other words, the King was the ‘executor’ because there was no prime minister. In addition to this, every year a high assembly (*Darbār-e A`la*) would gather and perform a review of the previous years achievements,<sup>88</sup> but no genuine independence was achieved in the constitutional establishment of this institution. In reality, it served a ceremonial function since it was held just before independence celebrations.

In addition to the council of ministers, the constitution established state and provincial councils, of which the king directly appointed half the members.<sup>89</sup> All of these councils merely acted as advisory bodies. There was also some formulation of a judicial system but the constitution did not establish a permanent judicial body. An interesting peculiarity is the exception made in Article 55, “No special court to hear and adjudicate a special case or issue may be established outside the framework of the regular judiciary.” For example, the application of any tribal customary laws fell into this category of a “special court” and therefore outside the framework established in the constitution. Perhaps by not allowing the tribal framework to operate within its own customary traditions, it was a convenient way for the central government to subdue the power of the tribal leaders, effectively reducing them to ‘wards’ of the state. If a formal separation of power is one in which the legislature and the executive are separated by, “making ministers responsible to the legislature and effectively denying the Crown its veto powers,”<sup>90</sup> than the observations made above show that a formal separation of powers never occurred in this sense.

***b. Lines of Accountability***

Checks and balances was a concept that was foreign to this Constitution. All ministers were responsible to the king and in the case of official misconduct, the constitution called for an immediate trial by a high court. Such a court was especially established for the duration of the trial,<sup>91</sup> as well as the immediate dismissal of the

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<sup>87</sup> Ibid., Article 25.

<sup>88</sup> 1923 Constitution, Article 27.

<sup>89</sup> Ibid., Articles 39 and 41.

<sup>90</sup> S.E. Finer, “Notes towards a History of Constitutions,” 25.

<sup>91</sup> 1923 Constitution, Article 56.

minister from all duties.<sup>92</sup> This, of course, did not apply in any case of misconduct on the monarch's part. A system of checks and balances was non-existent for such a circumstance. While Article 53 established an independent judiciary free from interference and intervention, as a separate power institution the court system was too complicated to be effective. To ease this burden, a separate law was drafted, *Nizāmnāma* of Basic government organization, in order to accommodate the three-tiered judicial system of *shari'a* courts that had already been in place at the time of the drafting of the constitution. Although Article 53 established an independent court system, the king had the power of appointing all of the judges that sat on the higher state-courts in Kabul.<sup>93</sup> Executive appointment of the judiciary in the top-level court systems is a common practice in many western constitutional governments such as the United States, but the rotation every four to eight years of the executive prevents any concentration of power in the judiciary. In Afghanistan's case, the monarch held power for a lifetime, thus having the ability to tip the balance of power by appointing judges favorable to his influence. In spite of the separation of institutions set in place by the constitution, the primacy of the power of the monarch prevented any true 'separation of power' and 'checks and balances' in the classical sense.

The constitution offered no institutions or process for the impeachment of the King. Moreover, the constitution virtually left the King's power unchecked. The government was limited only to the extent that the King would keep his promise to rule, "in accordance with the principles enunciated in the *Shari'a* and in the constitution."<sup>94</sup>

## **5. Individuals and the State**

In light of a century of political and ethnic turmoil prior to 1919 and the confluence of the Pashtun tribes, in particular, which formed the monarchical apparatus; the constitution, in theory, codified another first – individual liberties and personal freedom for all subjects of the kingdom regardless of their religious or sect affiliation.<sup>95</sup> In addition, the codification of other basic freedoms included the right to a free press,

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<sup>92</sup> Ibid., Articles 31, 33, and 34.

<sup>93</sup> Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary*, (Leiden, Netherlands: E.J. Brill, 1985), 213.

<sup>94</sup> 1923 Constitution, Article 4.

<sup>95</sup> Ibid., Articles 8 and 9.

compulsory education, equal opportunity, personal property, equality before the law, and the redress of grievances.<sup>96</sup> Freedom of assembly and the establishment of political parties were not codified until later constitutions. While Amanullah's great national project was a genuine intent to safeguard citizenship and fundamental human rights, it was undermined by his failure to recognize the differences in ethnic tribal borders and fluidly incorporate all of these elements into the Constitution. It was also contradicted by his desire to keep the *ulama* and the tribal leaders of his kin group at peace.<sup>97</sup>

Another aspect to this analysis is the dynamic of the relationship between individuals and the state created by the formation of state and provincial councils as well as ministerial satellites placed in each province. It was Amanullah's purpose to provide a healthy development of provincial and local government in order to provide the linkage between the government and the people.<sup>98</sup> The constitution provided that each province have direct representatives to the government to give citizens a channel by which to file formal grievances.<sup>99</sup> Local communities traditionally kept to tribal standards by dealing with the *khan* who in turn brokered with the state representatives in the community. This elaborate system of tribal relationships based on loyalty and kinship, however, was the subject matter of an anti-corruption campaign that all but destroyed the relationship between the tribes and King and thus made it most difficult and conflicting for the new citizens of the state. The King's final arbiter for the modernization and nationalization project, the constitution, became a duplicitous tool for reverting to its centralizing tendencies by co-opting the Pashtun tribes in order to entrench the central administration and maintain power.

## **6. Religion and the State**

While Islam was codified in the constitution, it was also narrowly defined as a proclamation of the state religion and codified as the primary source for the rule of

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<sup>96</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, 25-27.

<sup>97</sup> The mechanism of integrating individuals in society through a socialization process via state institutions, albeit a western liberal concept, conflicts with the Islamic notion of the *umma*, which has been the primary mechanism of social integration in Afghanistan. Asta Olesen, *Islam and Politics in Afghanistan*, 123.

<sup>98</sup> Leon B. Poullada, *Reform and Rebellion in Afghanistan*, 105.

<sup>99</sup> 1923 Constitution, Article 13.

law.<sup>100</sup> Before the ratification of the constitution, the concept of the Divine Will was the primary source for legitimation of power and it was only through the support of the *Ulamā* that the king was able to legitimize his rule in this way. This practice of legitimizing the power to rule via Islam diminished greatly after the 1923 constitution came into effect with the dual nature of sovereignty. While the *ulama* were still a necessary component for the state to achieve legitimacy, an additional component was added as an authoritative source. Instead of the King ruling by ‘divine right,’ he also received legitimation through the nation.<sup>101</sup> “The only difference between the original text and the revised text, after the Khost rebellion is that it resulted in more explicit language on religion, especially with Article 2. Freedom initially granted to other religions such as Hindus and Jews suddenly reduced to the requirement to “wear distinctive clothing and pay special taxes.” Article 2 also amended the emphasis from declaring Islam the state religion to adding the provision that the official religious rite of the state was the Hanafi legal tradition.<sup>102</sup> It was as difficult to fuse these diametrically separate concepts as it is now and thus has been one of the primary obstacles to fulfilling a genuinely democratic building process within the state.

## 7. Ethnicity and the State

At the writing of the 1923 Constitution, the organization of society was extremely tribal-centric, with family, village, and community units all centered on the *khan* (tribal leader) and in most cases related to the *khan*. Prior to the Khost rebellion and the resulting amendments made to the constitution, there was no reference made to the existence of any tribal structures.<sup>103</sup> This contributed to the various reasons for the outbreak of civil violence. It is not so much the absence of tribal elements in the constitution that disregard the important role that tribal and ethnic structures play within Afghanistan but the presence of elements that directly counter this tribally fragmented society. For example, Article 22 states that, “confiscation and forced labor is absolutely prohibited except that during time of war, labor services may be required in accordance with the provision of appropriate laws.” While this statement appears to be ambiguous, if

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<sup>100</sup> Ibid., Article 2, 5, 16, 21, and 72.

<sup>101</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 122.

<sup>102</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, 44.

<sup>103</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 124.

the reference is made to the appropriate *Nizāmnāma* regarding service to the nation during time of war – the law concerning domestic military service – then it became clear the meaning of Article 22. This *Nizāmnāma* enacted a lottery system of conscription,<sup>104</sup> which embroiled the tribes because the lottery, or *hasht nafari* system, conscripted every eighth man of a village or community. The local *khan* was traditionally in control of recruiting village men during a time of crisis. The Law essentially stripped this traditional power from the *khans*. Another point of particular contention resulting from the language in the Constitution, involved the challenge it made to the traditional role of the men in the family. Articles such as granting personal liberties, education for all, and equal rights,<sup>105</sup> essentially gave many liberties to women. Women in traditional Afghan tribal society are intimately linked with the concepts of *nang* (disgrace) and *nāmus* (reputation/chastity). The Constitutional Articles allowing for free education to all and personal liberties implied Amanullah’s reforming policies for granting liberal education to women as well as the practice of unveiling. The tribesman saw this action as a direct threat to their honor.<sup>106</sup>

## 8. Constitutional Reality

The 1923 constitution was essentially an extension of the Reform policy enacted by Amanullah at the beginning of his reign in 1919. As with the emphasizing elements of the reform policy – legal, judicial, administrative, and economic – the basic framework of the constitution that codified these institutions was the extent of 1923 Constitutional experiment. For Olesen the reform policy reflected, “a vision of an Islamic model of modernization and the admiration of the Young Turks’ practical and secular efforts to turn a Muslim empire into a modern nation-state.”<sup>107</sup> The Constitution was created only in order to codify the state administrative apparatus. No real effort was made to make the process representative, transfer sovereignty to the people, grant individual rights, or represent the various religious, ethnic, and tribal elements. After the creation of institutions, it conceded to the *ulamā* in order to keep them at peace,<sup>108</sup> which created

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<sup>104</sup> Leon B. Poullada, *Reform and Rebellion in Afghanistan*, 104.

<sup>105</sup> 1923 Constitution, Articles 10, 14, 16, and 68.

<sup>106</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 137

<sup>107</sup> *Ibid.*, 120.

<sup>108</sup> *Ibid.*, 121.

dynamics that led to an ambiguous political atmosphere. Even the people empowered to design the state were at a loss with how to create a dichotomous political apparatus that integrated Islam into a western liberal constitutional model. Modernization was not just a process but a wholly abstract idea and something that Afghans were not prepared. The continuance of tribal customs remained the practice in the countryside while the constitution merely entrenched the centralizing tendencies of the state.

### C. 1964 CONSTITUTION

The period after the Second World War<sup>109</sup> created new socio-economic patterns that began taking shape in Afghanistan from the 1950's onward and the 1964 constitution was primarily a response to this. Beginning with the 1931 constitution, a new and very large class of middle-income people, primarily from urban areas, began to emerge from the various programs enacted throughout the Musahiban dynasty.<sup>110</sup> Foreign-aid-funded domestic and foreign education programs dominated this entire period. These education programs created the most visible outlets for the new middle-class students who no longer associated themselves with their tribal kin group or their religion. Common names for which they have been referred include intelligentsia,<sup>111</sup> technocrats, and urban elites. The foreign-aid-funded growth also allowed the expansion of government institutions, which provided jobs for a small portion of the new middle-class, particularly the urban elites. This new class empowered by their new positions realigned the power bases and threatened the positions traditionally held by notables (especially those that were part of

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<sup>109</sup> After Amanullah abdicated the throne in January 1929, political turmoil beset the country once again and it was not until his military commander during the Third Afghan War in 1919, Nadir Shah, stepped forward to assume the responsibilities of reorganizing the state. The *Loya Jirga* was reestablished in order to do this but it was not just made up of an ethnically homogenous group; the Pashtuns. "It was composed of delegates from each Tribe and Province throughout the country for a total of 286 people."<sup>109</sup> The 1931 constitution was significant because unlike the 1923 constitution with its largely symbolic advisory bodies placed among the provinces, the 1930 *Loya Jirga* agreed to create a bicameral legislature. The creation of the constitution borrowed heavily from French, Turkish, and Iranian models. What made the process of writing the 1931 constitution different from the 1923 document was the *Loya Jirga*. It was perhaps the most representative body of Afghans permitted to take part in the design of the constitution. The thirty-three years between 1931 and 1964 was not a clear success in the sense of absolute political participation by all citizens, which was there right, but the longevity of the document itself speaks to the representative body allowed to participate in the writing of it.

<sup>110</sup> The Musahiban period is the period of time from which Afghanistan was ruled by the members of one family starting with Nadir Shah who was crowned King in 1930 to the end of Mohammad Daoud's short period of presidential rule in 1978, shortly before the Russian invasion.

<sup>111</sup> Barnett Rubin, *The Fragmentation of Afghanistan*, 20.



the royal family) and powerful religious figures.<sup>112</sup> Meanwhile another large, highly educated portion of society were left out or barred from government jobs and subsequently became dispossessed. The new constitution continued the necessity for emphasizing Islamic religious elements as well as individual freedoms. But in ways contradictory to Islam, it managed to widen the gulf between Islamic ideals, modernism, and western-liberal democracy. The emergence in this period of other new groups included those who were greatly influenced by communist ideals. So began the communist movement in Afghanistan that would interfere in the democratization process in Afghanistan for the next 30 years. Incidentally, these first-generation middle-class students also formed the bulk of the Islamist groups who were not only actively hostile to the communist groups but challenged the traditional *ulamā* who were consistently co-opted by the state apparatus. Despite the intellectualization primarily of Afghan urban society, the traditional tribal and religious apparatus remained an integral part of the local community and rural level of society.

The “New Democracy” period in which produced the 1964 Constitution was also a period in which the state was trying to reestablish itself. The King at the time of the new *Loya Jirga* felt that reforms were not only necessary because of this growing gulf between competing interests, but also that a new constitution would help redefine the organization of government. It is quite possible that this move was intended to enlarge the existing state structure in order to appease the growing anti-monarchy movement and attempt to offer government jobs to many disaffected Afghans. An example of this in the constitution is the insertion of Article 24, the restriction of all members of the royal family from holding public office, mainly at the state level. In any case, the competition between all of these new groups marked the beginning of the transformation in the traditional alignment of state power. In other words, the new educated middle-class urban elites became the dominating force behind the power axis rather than the old tribal familial and religious power blocks.

Table 2 demonstrates for the first time that representation in the codification process became an important factor in legitimizing the state rather than a de facto

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<sup>112</sup> Olivier Roy, *Islam and Resistance in Afghanistan*, 23.

institution. As the annotation of positive and negative values in the codification process show, however, the process involved factional groups as well as the King's own Royal group that dominated the proceedings. Nevertheless, it shows that the desire for modernization continued as part of the state's agenda but without completely alienating Islam. Lastly, the results of some key propositions begin to show relational patterns between factors such as, the distribution of sovereignty, determination of individual relationships to the state, and the degree to which ethnicity is presented. The next section begins with a discussion of the formation and conduct of the *Loya Jirga*.

	Codification	Legal Status		Sovereignty	Institutions		Individual	Religion		Ethnicity
	Representative?	Supreme? Amenable?		Fully distributive?	Power Distribution? Accountability?		Relationship with the state?	Codified? Narrowly?		Degree of Presence
1964 Constitution	--+	+	+	-	+	-	-	+	+	-

Table 2. 1964 Constitutional Factors.

## 1. Codification

While the 455 member *Loya Jirga* was an exercise in political participation, a fully representative body did not actually materialize. However, relative to the *Jirga* process that created the previous constitutions, the King achieved the goal of a greater amount of representative participation by the populace. He appointed four women and 34 other delegates including military generals, religious figures and a number of bankers and western educated intellectuals. Statewide elections also resulted in an additional 176 delegates. The remaining delegates to the *Loya Jirga* included the government institutions and the two smaller constitutional commissions.

Prior to the formation of the *Loya Jirga*, the King, by royal decree, formed a seven-member constitutional committee on 28 March 1963, primarily as a response to the change in the dynamics of the political atmosphere. By all accounts, the only foreign advisor present at this time was a French constitutional expert, Louise Fauger. This is peculiar since the writing process of the previous constitutions, while using the advice of different foreign advisors from France, Turkey, and Iran, took great care in following the example of fellow Muslim states. Thus, the 1964 constitution took heavy stock in a

western, primarily French constitutional model, even though the final version still combined Western and Islamic concepts. The cause of the departure of using the Islamic model was attributed to the dominance of the intellectuals at the *Loya Jirga*, who favored the more liberal western constitutional model, which resulted in the limited influence of the *Ulama* on the final draft process.<sup>113</sup> Olesen described this transformation of legitimacy as one in which the ultimate source of authority now rested with the nation, was embodied in the King and practiced via the parliament.<sup>114</sup>

The first of three carefully formulated meetings of drafting and advisory groups for the final ratification of the constitution produced a written draft of the new democratic constitution in February 1964.<sup>115</sup> In light of the circumstances of Afghanistan's constitutional history, the drafting process of the 1964 constitution was perhaps one of the most important experiments in Afghanistan's desire to achieve a liberal and representative approach in the creation of a constitutional government. To demonstrate this example, the drafting committee, in order to carry out its mission in a more thoughtful and representative manner, underwent a two-pronged approach. First, a public outreach campaign sought the opinions of various groups within the society as well as organized consultation sessions held with local experts. Secondly, the drafters referred to an entire range of possibilities in order to write a uniquely liberal and Islamic constitution. This strategy included surveys of Islamic law, modern constitutions, and other pertinent documents.<sup>116</sup> This became the first time a fully representative body of Afghans diligently and genuinely participated in the discussion and drafting of the new constitution. Once this process was complete, the draft made its way to a 29-member advisory commission. The advisory commission was essentially a barter commission, tasked to, "study and discuss the draft carefully and make suggestions before convening the *Loya Jirga* for its approval."<sup>117</sup> The diversity of the group in addition to the King's inclusion of several members of the royal family initiated a heated debate as to the role

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<sup>113</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 208.

<sup>114</sup> *Ibid.*, 207.

<sup>115</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, 87-88.

<sup>116</sup> *Ibid.*, 87.

<sup>117</sup> *Ibid.*, 88.

the royal family played in state politics.<sup>118</sup> The findings were submitted at the conclusion of the three-month long debate to the *Loya Jirga*.

The intention of the way in which the *Loya Jirga* was carried out was to ensure sincere representation by allowing elections to incorporate delegates from the population. The data regarding the process in which these elections took place was not entirely thorough. Therefore, it would be false to say with any certainty that elections took place throughout a representative portion of the provinces. Comparatively speaking, Zahir Shah's willingness and desire to continue the thrust towards a modern and more liberal society, just as Amanullah's was in 1923, was more carefully planned and laid out. The entire process from draft to ratification took 19 months and was signed on 1 October 1964.

## **2. Legal Status**

There are several places that have enshrined the superiority of the constitution over all other laws. First, Article 14 limits the exercise of rights and duties to the provisions codified in the constitution, then Article 40 makes it the duty of all citizens to follow the provisions within the constitution, and finally Article 64 prevents the parliament (*Shura*) from enacting legislation repugnant to Islam and the constitution. But in terms of acknowledging or incorporating the customary laws that traditionally dominated the region, the Constitution was silent. While the principle of supremacy is clearly laid out, the standards for amenability will determine the guarantee of its legal status. Therefore, it is important to point out that as Article 120 codified the amenability it is not without critical exceptions. Exceptions within the Constitution to which no amendment could be made included any reference to Islam, the constitutional monarch, and any part of Article 8 which referred to the King's status as an "Afghan national, a Muslim, and follower of the Hanafi doctrine." Article 8 reinforced the infallibility of the monarchy by securing the King's line of succession, thus holding the monarchy outside the supreme limits of the law. In addition, it reinforced the Hanafite legal rite practiced by the head of state. In other words, amendments could not be established that would abolish the monarchy or force the abdication of the King. To be sure, Article 17 specified that abdication only came at the desire of the King and even if this were to

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<sup>118</sup> Ibid., 89.

happen, the constitution ensured the royal line of succession as well as the prevention of the amendment of any of these parts. In any case, the standards under which any other part of the constitution could be amended were much more rigorous than that of the 1923 constitution. Article 120 allowed the process to begin via initiation by either the council of ministers, one third of the members of the lower house, (*Wolesi Jirga*) or upper house (*Meshrango Jirga*). This process then moved to the *Loya Jirga* where, in Article 121, a majority vote was required to approve the draft amendment. This draft amendment was then presented to the King who then dissolved the *Shura*, publicly circulated the draft, and proclaimed the date in which new elections were to be held. The very initiation of such a procedure could threaten the term limits of government seats and therefore decreased the likelihood that amendments were even proposed. Nevertheless, it was clear that the careful drafting of this constitution made it supreme over all laws, but not immutable.

### **3. Distribution of Sovereignty**

Article 1 of the 1964 Constitution fully enumerated that sovereignty rested with the nation” and further specified in Article 41 that representation of national sovereignty was exercised by the *Shura*, via the King. The King, in this case, was the personification of sovereignty and for all of the King’s intentions of incorporating liberal elements, the traditional absolute power of the monarchy remained. Enshrining the concept of popular sovereignty in the people exacerbated other contradictions present in the constitution regarding such matters as royal prerogatives. “The royal prerogatives included the dissolution and the summoning of the *Shura*, the appointment of the Prime Minister and the other Ministers and of the Chief Justice and the Senior Civil and Military Officials and the power to proclaim a State of Emergency.<sup>119</sup> The constitutional Articles thus created a weave of contradictions that increasingly became difficult to resolve. In particular, embodiment of the *Shura* was to be a representative portion of the nation that would exercise sovereignty on the nation’s behalf. The power of the King to dissolve this body as well as transfer much of its powers to the government ministry during a state of emergency, trumped the ability of the *Shura* to carry out its duties and the will of the

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<sup>119</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, 98.

people.<sup>120</sup> It is perhaps due to the largely inherent mistrust of ethnic dynamics and the potential for the formation of political factions within the *Shura* that prevented the grant of any degree of autonomy.

#### **4. Relationship Between the Institutions of the State**

The 1964 constitution “signaled the end of authoritarian rule and established the framework for a parliamentary democracy.”<sup>121</sup> Also in a break with the past, the constitution codified the formal organization and independence of the judiciary. Previously, the organization of the judiciary was laid out in a separate law, or *Nizāmnāma*. Overall, great care was taken to demarcate the role and independence of the executive from other state institutions including the legislature, the judiciary, the government ministry, and the *Loya Jirga*.

##### **a. Separation of Powers**

The most recognizable aspect that set the 1964 constitution apart from its predecessors was the “separation of the executive, legislative, and judicial powers.”<sup>122</sup> A tripartite division of power parted with the traditional centralizing tendencies of the monarch to retain personal power. Parliament consisted of an upper house (*Meshrango Jirga*) and a lower house (*Wolesi Jirga*)<sup>123</sup> and was granted the power to independently “ratify international treaties, the dispatch abroad of detachments of Afghan armed forces, the grant of concessions important to the national economy including monopolies, and the authorization to issue money and obtain loans.”<sup>124</sup> This was a distinct departure from the 1923 constitution, which essentially reduced the legislative branch to the status of an advisory body to the King. Nevertheless, with the power of the King firmly established in one of the most liberal documents in Afghanistan’s history, this power inherently limited the authority with which the legislative branch could carry out its business.

Unlike the earlier constitutions, a system of higher courts including the Supreme Court was among the principles codified. The establishment of the hierarchy of

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<sup>120</sup> 1964 Constitution, Article 114.

<sup>121</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 206.

<sup>122</sup> A.S. Sirat, “The Modern Legal System of Afghanistan,” *The American Journal of Contemporary Law* 16, no. 4 (1968), 565.

<sup>123</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 206.

<sup>124</sup> 1964 Constitution, Article 64.

courts was certain and no longer paid a lip service to establishing a judicial court system as many had characterized the constitutional period of Amanullah. Although the King maintained the power of appointing judges, it was only upon the approval made by the chief justice. In addition to appointing judges on the Supreme Court, the King also held the power to appoint other lower judges and high-ranking civil and military officials.<sup>125</sup> Above all, the entire judiciary was a complete and independent branch from that of the executive and legislative branches.<sup>126</sup>

Finally, Article 107 granted the Supreme Court the position of “highest judicial authority in Afghanistan” and the ability to have complete control over all judicial affairs “in accordance with the provisions of the constitution and the law.”

Another new facet to the 1964 constitution was giving the traditional *Loya Jirga* status as a constitutional body.<sup>127</sup> If limiting the power of the King was an intention of the drafters, the power granted to the body of the *Loya Jirga* was the incarnation of this intention. Although it met only on rare occasions, it received the power to approve constitutional amendments, a power usually reserved for the King. Not only did the *Loya Jirga* enjoy authority in amending the constitution, but particularly with regard to the “State of Emergency” defined in Title Nine. If the King dissolves the *Shura* as a result of declaring a state of emergency, the ability to restore order and reinstitute the *Shura* can only be accomplished by the *Loya Jirga*. The 1964 constitution was the first time in Afghanistan’s history that concurrence from a *Loya Jirga* was required to extend the King’s proclaimed state of emergency beyond three months.<sup>128</sup>

***b. Lines of Accountability***

“The King is not accountable and shall be respected by all.”<sup>129</sup> This made it very clear in which direction the lines of accountability went. But the realization of the emancipation of the parliament from its historical advisory role was limited because the

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<sup>125</sup> Ibid., Article 9.

<sup>126</sup> Ibid., Article 97.

<sup>127</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, 112.

<sup>128</sup> 1964 Constitution, Article 113.

<sup>129</sup> Ibid., Article 15.

King still had the power to dissolve it.<sup>130</sup> In spite of these provisions, the concept of confidence voting allowed for a check on the powers of the executive when selecting ministers. “The government is responsible to the *Wolesi Jirga*” (The Lower House was also called the House of the People)” and confidence voting was meant to be a check on the executive, or the ministry, in the event that the *Wolesi Jirga* disapproved of the policy or selection of ministers.<sup>131</sup> Unfortunately, the aim to create a check on the ministry ended in the “fall of the ministry” in the case of a vote of no confidence.<sup>132</sup> This meant there was no room for error or negotiations with policy, a new government would simply have to be reinstituted. This absence of a mechanism for negotiation created a pocket for potential instability.

## **5. Individuals and the State**

Chishti and Olesen posit that the 1963 constitution enshrined the individual as the “recipient of liberty”<sup>133</sup> and therefore the entire collection of individual Afghan citizens comprised the nation as a whole. The constitution reflected this by enshrining individual liberties such as the right to privacy, private property, free speech as well as other forms of communication, freedom of expression, free assembly including the formation of political parties, freedom to petition the government, free education, and finally the freedom to work.<sup>134</sup> Duties of the citizens were also enshrined and they included the payment of tax, the performance of military service, and the duty to obey the constitution, the king, and to “participate in the nation’s life.”<sup>135</sup> In spite of the careful inclusion of the rights of citizens, several interesting twists exist in Title Nine – State of Emergency. For example, in the event of a state of emergency, Article 115 codified the stripping away of certain individual rights. In particular, the right to privacy – property and communications, the right to private ownership, the right of assembly, and the right to compensation due to damages incurred by the state. Of particular importance in a

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<sup>130</sup> Ibid., Article 63.

<sup>131</sup> 1964 Constitution, Art. 65 89, and 96.

<sup>132</sup> Ibid., Art. 90-91.

<sup>133</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, 98.

<sup>134</sup> The “Freedom to Work” Article was based on the history of the forced labor of the minority Shi’i Hazara ethnic community, who inhabit the central region of Afghanistan bounded by the Hindu Kush mountain range. 1964 Constitution, Art. 28-34 and Art. 37.

<sup>135</sup> 1964 Constitution, Art. 38-40.



democratic society is the right to form political parties. In the absence of the freedom of assembly, underground factions can crop up that will either hinder the proposed democratic process or, worse, break out in rebellion and fuel a regime change. Article 32 detailed the right of individuals to assemble but limiting that right to, “the values embodied in the constitution.” But what were these values? If they were as Article 2 represents, than forming political parties were limited to predominantly Hanafi Sunni Muslims, a convenient course of action in the case of a highly centralized state. “A state of emergency could only be declared by the King, which included serious disturbances or similar conditions which endanger the country.”<sup>136</sup> But what were ‘serious disturbances or other ‘similar conditions’ that could endanger the country? This meant that, short of an all out rebellion or war breaking out, the King had a limitless meter to gauge whether or not the country was in any danger. Constitutionalism recognizes that fundamental rights may be restricted,<sup>137</sup> but it is through the advice and consent of the *Shura*, the representatives of the people, that those fundamental rights are best limited. It stands therefore that the codification of the rights of the citizens were more privileges than rights and the limitation thereof was at the pleasure of the King.

## **6. Religion and the State**

Article 2 narrowly defined the role of Islam in the state. It reiterated the principles laid out in the 1923 Constitution that, “Religious rites performed by the state shall be according to the provisions of the Hanafi Doctrine.” While many scholars attempted to challenge the notion that the 1964 constitution created a secular Afghan state because it incorporated a purely Western model, it is an interesting fact to illuminate the significant portion of religious leaders that participated in the *Loya Jirga*.<sup>138</sup> By narrowly defining the role that Islam played, many large ethnic groups such as the Hazara were not fully recognized nor represented in the constitution. As Olesen pointed out the constitution’s “western ideological heritage,” many have failed to recognize that there were several attempts made by the *ulama* present at the *Loya Jirga* to engage in debates over the language that codified religious sentiment and the insistent push to modernize.

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<sup>136</sup> 1964 Constitution, Art. 113.

<sup>137</sup> András Sajó, *Limiting Government*, 278.

<sup>138</sup> András Sajó, *Limiting Government*, 208.

The participating clergy saw the 1964 Constitution as a marginalization of Islam and it was embroiling to them, but the subject did not receive the debate that many had hoped. This is mainly because of the increasing opposition, at the time, presented by two poles within the clerical hierarchy. That is, the traditionalists who were mainly opposed to what amounted to a secular status placed on the judiciary, and the modernists who were willing to concede certain aspects of the judiciary as long as laws were not repugnant to Islamic traditions. The dynamics and influential of the two traditional forces in Afghan politics – Islam and tribalism – were increasingly being set aside to a new dynamic group of educated elite and urban intelligentsia. This group set the stage for the drive towards modernization thus clearing away the importance of religious and customary traditions at the state level. For all of its liberal elements and provisions of freedom, the *ulama* were still able to come out on top with a narrow definition of the use of Islamic jurisprudence in the judicial apparatus of the state.

## **7. Ethnicity and the State**

An ongoing practice in the constitution-making process throughout Afghanistan's history has been the exclusion of any role that the fragmented ethnic elements could play in the political process of the state. It is no surprise then that the 1964 constitution affectively eliminated the roots of tribal politics in Afghanistan. There is no indication that tribalism in Afghanistan today is any different than it was 150 years ago. The same was true in 1964. The constitution incorporated the same centralizing elements as all previous constitutions had done and in all cases, the tribes remained an active opposing force to the state apparatus. Title Eight defines the Administration as the organization of provinces.<sup>139</sup> The constitution, however, did not explicitly state that elections of members for the provincial and municipal councils be conducted along ethnic lines, it is assumed that the free elections mandated in the constitution would produce results that roughly correlated with ethnic loyalties.<sup>140</sup> Article 112, however, states that, "the functions of the administration shall be carried out by the civil servants and other administrative employees." The civil servants and administrative employees are the primary conduit between the local community and the state and it is often through ethnic

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<sup>139</sup> 1964 Constitution, Article 108.

<sup>140</sup> Ibid., Article, 109.

commonalities that the greatest communication takes place at this level. As Barnett Rubin stated in his book, *The Fragmentation of Afghanistan*, “the Musahiban dynasty encapsulated rather than confronted social resistance by imposing an external administration laid over the existing society.”<sup>141</sup> Unfortunately, the constitution allowed for this because it did not explicitly correlate an administrative unit along ethnic lines and therefore employees themselves were not required to have ethnic ties to the community. The *khans*, once again, were disenfranchised because this interfered with the local power structure and social turmoil in the countryside ensued.

## **8. Constitutional Reality**

The 1964 Constitution proved a great leap forward in producing institutional stability but by reneging on the right of individuals to assemble and thus discourage the full participation of society, the Constitution experienced major setbacks such as democratic participation. Delaying the enactment of laws regarding political parties<sup>142</sup> alleviated the fear that factions would align along tribal loyalties form grand coalitions and threaten the power structure of the monarchy. This ultimately marginalized the reality of Afghan society. During the eight years between 1965 and 1973, the cabinet turned over five times.<sup>143</sup> The result was a vacuum filled by the political underground, which eventually led to the 1973 Coup that overthrew the monarchy. Overall, the establishment of the constitutional monarchy of 1964 did nothing for incorporating the tribal fragmentation since it called for continuing the Durrani legacy and their right of inheritance and continued the Pashtun dominance over the state apparatus. The 1964 Constitution did however provide a healthy framework for more basic individual freedoms and liberties that had never been previously experienced.<sup>144</sup> Unfortunately, Afghanistan in the years following suffered an ideological crisis partly brought on by the fact that the “new democracy” failed to allow political parties to form and legitimately participate in the political process. The following analysis of the 1977 Constitution will reveal how this ideology was able to take control of the state apparatus and transform

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<sup>141</sup> Barnett Rubin, *The Fragmentation of Afghanistan*, 20.

<sup>142</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 211.

<sup>143</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, 113-124

<sup>144</sup> 1964 Constitution, Article 32.

Afghanistan into dangerous factious groups competing for political power and eventually brought the Taliban to power.

#### **D. 1977 CONSTITUTION**

The 1977 Constitution of Afghanistan continued the dominance of the single-party/single-ruler system. The formation of the Afghan communist parties in the mid-60's helped make this a reality. The state was heavily dependent on foreign-aid, but as this aid began drying up, corruption increased and the communist ideas began to be a very popular alternative at the Kabul University campus. The favor given to the Marxists, who later became known as the PDPA (Peoples Democratic Party of Afghanistan), eventually led to the overthrow of the monarchy in 1973. Incidentally, the very same group who put Mohammad Daoud into office in the first place led the subsequent overthrow of his regime in 1978.

Much of the political transformation that took place soon after Daoud took over as President in 1973 is played out in the words of the 1977 constitution. The Constitution represented a significant ideological departure from Afghanistan's previous constitutions, in that it was an attempt to refit the government along a completely socially democratic axis. One political party was designated as The National Revolution Party or *Hezb-e Enqelab-e Meli*<sup>145</sup> thus centralization persisted. As if Afghans could not be more confused with trying to come to grips with formulating a sense of nation and understanding the concept of constitutionalism in a purely Afghan context. The ideas espoused in the social democratic movement of Daoud's regime set the stage for following years of political chaos. The military and leftist-communists were two groups granted power during the Daoud regime, that never previously enjoyed the power-status held by the *ulama* and tribal groups, which long dominated the statewide politics for centuries.<sup>146</sup> Although the constitution never went into effect after its ratification, it is worth analyzing here since the *Loya Jirga* was used to create it. For Afghanistan, the *Loya Jirga* has always held great significance, so much so, that any regime will seek its approval. No matter how representative it is it, the legitimacy that is attached with it is the driving motivator of the regime.

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<sup>145</sup> 1977 Constitution, Article 40.

<sup>146</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 220.

Table 3 illustrates the results of the repressive policies carried out under Daoud's regime as well as the reversal of many of the liberalizing policies of the regime before him, as revealed by the negative annotations. Islam was given no authority or superior status by which the regime sought legitimation, other than being declared the religion of the state. In the following analysis, the codification process will reveal that representation was virtually non-existence without the approval of the Revolutionary Party, which was essentially the PDPA in disguise.

	Codification	Legal Status		Sovereignty	Institutions		Individual	Religion		Ethnicity
	Representative?	Supreme?	Amenable?	Fully distributive?	Power Distribution?	Accountability?	Relationship with the state?	Codified? Narrowly?	Degree of Presence	
1977 Constitution	--	-	-	-	-	-	-	-	-	--

Table 3. 1977 Constitutional Factors.

### 1. Codification

The years after the overthrow of the Monarchy between 1973 and 1977 the government apparatus was administered by a series of Presidential decrees put in place by then President Mohammad Daoud, cousin to the ousted King Zahir Shah. One of these decrees appointed a twenty-member commission to review a newly drafted constitution. After nine months of review, the commission forwarded the constitution to a formal *Loya Jirga*, consisting of 492 members. The election of the members of the *Loya Jirga* took on a rather unusual quality.

On specific days, candidates put themselves forward in each of the rural administrative districts and in the Urban Wards, for a total of 219 constituencies. The people voted for their candidates with either a show of hands or shouts, until the overwhelming majority of the crowd supported one candidate.<sup>147</sup>

To the surprise of many critics, the opening session produced a string of debates amongst its members that proved it may not have simply been a "rubber-stamp" after all.<sup>148</sup> The *Loya Jirga* membership appeared to be a representative body, since almost half were freely elected. Additional representation came from the Presidential

<sup>147</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, 131-32.

<sup>148</sup> Ibid., 132.

appointment of 130 members representing the military, industry, women, farmers, and urban intellectuals. However, the groups who had already been firmly established in the state apparatus since 1973, held most of the power within the *Loya Jirga*. These groups included the High Council of the Armed Forces as well as the Central Council of the Party. The Party was the representative apparatus of the Parchami wing of the communist PDPA. The *Loya Jirga* passed the constitution and President Daoud ratified it on 24 February 1977.

## **2. Legal Status**

The supreme legal nature of the 1977 Constitution was determined by Article 64 to be shared with and between Islam and the “Republican Order.” Conversely, Article 75 placing the charter of the Party at parity with the legal status of the Constitution when describing the office of the President. It is therefore difficult to single out the constitution as the supreme law of the land when in order “To have the ability to determine the legal system, the constitution must be above all other legal regulations.”<sup>149</sup> The dominance of the Charter of the National Revolution Party in the constitution created a very interesting puzzle as to the legal status of the constitution and as the foreground for which all other constitutional constraints come.

The constitution’s less than supreme status made it vulnerable to amenability. With the exception of the basic principles of Islam and the Republican Order, Article 121 made amendment to the constitution as easy as a mere initiation by the government, the Central Council of the Party, or one third of the *Meli Jirga*. It is unusual that the Central Council of the Party, having had no constitutional mandate, was given the ability to initiate amendments. This council other than the right it was given to sit on the *Loya Jirga*, was an ominous organization for which the constitution provided a superior status to enact amendments.

## **3. Distribution of Sovereignty**

Unlike the 1964 constitution, which manifested sovereignty in the monarch, the manifestation of sovereignty is unclearly represented in the 1977 Constitution. The 1977 Constitution established, early on, the language of national sovereignty. The first article codified the protection of national sovereignty as a fundamental objective of the state.

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<sup>149</sup> András Sajó, *Limiting Government*, 39.

Article 21 further characterizes the nature of sovereignty as belonging to the people. What actually emerged was a two-tiered hierarchical system in which sovereignty was to be practiced. First, Article 48 established the *Meli Jirga* as representative of the entire nation and the manifestation of the “people’s will.” Then, Article 65, which established the *Loya Jirga*, trumps Article 48 by characterizing the *Loya Jirga* as the “Supreme manifestation of the power and will of its people.” At closer look, however, the constitution made stipulation on the membership of the *Loya Jirga*. This revealed that the traditional makeup based on an accurate representation of the ethnic tribes was superimposed with the socialist groups that Daoud brought into power, more specifically, the members of Central Council and the *Meli Jirga*, most of which consisted of various individuals of the Party. It stands therefore that sovereignty was not fully distributive among the people so long as the Party dominated the membership of the assembly.

#### **4. Relationship Between the Institutions of the State**

One of the most easily visible differences of the 1977 constitution from previous documents is the abolishment of the monarchy. But even more glaring in the Constitution, which was meant to be the modern democratic alternative to the 1964 Constitution, which Daoud considered not democratic enough, was the deeper centralizing tendencies of the regime manifested within the document. “The new Republican constitution stipulated presidential rule, a single-party system, and a unicameral parliament...therefore the judiciary and parliament lost most of the previously enjoyed constitutional powers.<sup>150</sup>

##### **a. Separation of Powers**

The executive embodied in the office of the president became the central focus of the exercise of power in the 1977 Constitution. Many Articles stipulated that the President as well as half of the *Meli Jirga* be nominated by the Party and that the *Loya Jirga* which already contained many elements of the Party, elect the President thrusting the state apparatus into a position of subordination.<sup>151</sup> In other words, the Party legitimized the ability of the President to assert his power autocratically. As the government’s principal design was as an executive organ of power, it is no surprise that

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<sup>150</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 221.

<sup>151</sup> 1977 Constitution, Article 49, 65, 67, and 76.

Article 91 stipulated that the first of the government's duties was to implement the "basic principles of the Party."

The legislature was reduced to a unicameral body called the *Meli Jirga* or National Assembly of which fifty percent were nominated by the Party and through a separate division by the government into electoral constituencies would be 'freely' elected by the people.<sup>152</sup> Any legislative proposal had to meet the standard that it not be contrary to Islamic principles or the principles embodied in the constitution but a strange addition was that legislative proposals were not to go against the Republican Order,<sup>153</sup> once again placing an institution of the government at the mercy of the Party.

The *Loya Jirga*, traditionally known as a body that could restore peace and stability by consensus among tribal leaders, was now given the status as a second arm of the legislature. The *Loya Jirga* was a body, as with previous constitutions, that met only on certain occasions, but was granted much greater latitude with respect to power sharing. The membership, dominated by the Party, ensured that any legislation, amendments, and cases of treason, impeachment, or resignation were at the explicit approval of the Party.

The judiciary, unlike previous constitutional experiments was stripped of much of its power. "The supremacy of the constitution means that acts of parliament are meant to be in harmony with the fundamental principles of the constitution."<sup>154</sup> If they are not, there must be the capacity for the review of such action. Judicial review is often a primary duty of the Supreme Court to act as a check on the power of the legislature to enact laws, but the 1977 constitution stripped the court of this responsibility. The amenability of the constitution, and judicial review all resided with the Party.

***b. Lines of Accountability***

"To avoid dictatorship, power should be counterbalanced with power...giving the leaders of each branch of government the appropriate means to restrain interference into their sphere of authority."<sup>155</sup> In addition, accountability means

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<sup>152</sup> Ibid., Article 49.

<sup>153</sup> 1977 Constitution, Article 64.

<sup>154</sup> András Sajó, *Limiting Government*, 226.

<sup>155</sup> Ibid., 70-71.



that oversight is the responsibility of each branch of government to ensure the obligation of another branch of government to correct any violations or commissions of unconstitutional acts. The 1977 Constitution, however, stripped the power-authority from the judiciary, co-opted the power of the legislature by installing a dominant Party presence, and even made the President accountable to the Party. Thus, the Party was the guarantor of power and all branches were accountable to the Party, including the President. Judicial review was non-existent, providing no check on the power of the legislature to make and enact laws.

## **5. Individuals and the State**

As many of the individual freedoms are expressed in Daoud's constitution, as they have been in the past, they are soon undermined by other contradictory policies. For example, the Constitution reversed the concept of the 'freedom to assemble' and to form political parties. Article 39 intended to permit this freedom but Article 40 trumped the right of assembly by establishing a one party system, led by the National Revolution Party or *Hezb-e Enqelab-e Meli*. Daoud at the time of the writing of the 1977 constitution was heavily influenced by and involved with the Marxist groups that formed Afghanistan's version of the communist political agenda in the 50's and 60's, not to mention the fact that Afghanistan became an allocation state by receiving almost half of its budget in foreign aid, particularly from Russia.<sup>156</sup> It was through the Democratic Government of Zahir Shah's 1964 constitution, unfortunately, that made the emergence of these parties possible, hence dominating, and eventually overshadowing the traditional role that the *ulama* and the tribes played in politics. But the 1977 Constitution went further than this by attempting to assimilate an Islamic and fierce ethnically tribal society to a socialist agenda. Just as with the liberalizing feature of both the 1923 and 1964 constitutions of free education and free expression, this interfered with the ethnic and traditional customs of the countryside, created further fragmentation radicalization of Islamist groups seeking to regain control of political power.

## **6. Religion and the State**

Islam was relegated to a symbolic status in the 1977 Constitution. Muhammad Daoud had a long-standing contentious relationship with the *ulama*, dating back to 1953

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<sup>156</sup> Barnett Rubin, *Fragmentation of Afghanistan*, 65-66.

when he was Prime Minister for his cousin, King Zahir Shah. His repressive measures against the religious establishment politicized the *ulama* and as a result initiated a split amongst the *Ulama*<sup>157</sup> that rendered them incapable of resisting Daoud's political dominance, especially after the 1973 revolution and including the writing of the 1977 Constitution. Daoud's vehement opposition to the Islamists, throughout this period was infamous.<sup>158</sup> Many Islamist figures throughout the Resistance during the Soviet Occupation including Rabbani, Abdul Haq, Hekmatyar, and Massoud, were all persecuted at one time or another during Daoud's time as Prime Minister in the 1950's and later as President in the 1970's. The role of religion in the Constitution therefore mollified Islam to a purely symbolic status and paved the way towards a new ideological expression, a socially democratic state. While the *Ulama* never intended to form a theocratic state, after 1923, they were always involved in playing a minor role in legitimizing the state as well as fulfilling the fundamental basis for the judiciary. Once this role of legitimizing authority was substituted for something else, however, the *Ulama* became a dysfunctional body of political influence and incapable of reorganizing against an increasingly repressive regime. In subsequent years, the *Ulama* became increasingly vulnerable to many of the radical Islamic groups that formed the Soviet Resistance and evolved into the Taliban.

## **7. Ethnicity and the State**

The Constitution was written in deference to the Party. This meant if there were to be any concentration of power it would only be in the hands of the Party, resulting in tribal as well as religious alienation. There were no provisions in the 1977 Constitution that paved the way for representative participation by tribally based ethnic groups. The other unfortunate facet to the lack of tribal representation in the constitution was that Daoud was an ardent supporter for the creation of a separate state, called 'Pashtunistan,' based on the homogeneity of the Pashtun tribes. It appeared as if Daoud had his hands in too many baskets. He eventually made a mortal decision to alienate the Party that he brought to power, in favor of appointing fellow tribesmen, perhaps with the intention of

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<sup>157</sup> The split was among *Ulama* that maintained the traditional view of the role of the religious establishment in the political sphere and that of a newly educated class of intellectuals who became familiar with key Islamic thinkers of the period that focused on Islamic modernization.

<sup>158</sup> Olivier Roy, *Islam and Resistance in Afghanistan*, 74.

realigning the state to produce a more favorable situation conducive to making an independent Pashtunistan. In any case, the decision to do this ended with his life.

## **8. Constitutional Reality**

Unlike the 1964 constitution, which defined the King's immediate family and subsequently excluded them from any involvement in politics, the 1977 constitution had no such provision. Instead, the constitution gave the President the prerogative to appoint anyone he wished and this was the reason the constitution was never put into effect. Daoud, by appointing a brother, many friends, sons of friends, and even members of the deposed royal family<sup>159</sup> essentially reverted to his ethnic Pashtun kin group. The constitution that he created was based on a set of principles that were little known to Afghans at the time.<sup>160</sup> Daoud effectively alienated non-Pashtun Afghans from exerting any sort of power on a statewide level, thrusting Afghanistan backwards by almost 100 years to Abdur Rahman's reign of 'Pashtun centralization by coercion. Upon the conclusion of Daoud's regime, constitutionalism fell apart. The provisions for social justice and civil rights were abrogated by the way in which power was granted to the Party.

## **E. COMPARATIVE ANALYSIS AND CONCLUSION**

Islam and tribalism as a traditional source of authority for legitimizing the state apparatus steadily declined throughout the constitution writing projects beginning with the 1923 Constitution. Table 4 is an illustration and comparison of the previous constitutional analyses. It exhibits the factors that run consistent through each of Afghanistan's constitution-writing processes and reveals important relationships between various propositions. For example, as the two positive annotations indicate, the 1923 and 1964 Constitutions were defined along such narrow terms as to codify the Hanafite legal school thereby marginalizing a large portion of the population, while the negative annotations indicate that the 1977 Constitution virtually excluded all references to Islam.

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<sup>159</sup> Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, 145.

<sup>160</sup> Barnett Rubin, *Fragmentation of Afghanistan*, 85.

	Codification	Legal Status		Sovereignty	Institutions		Individual	Religion		Ethnicity
	Representative?	Supreme? Amenable?		Fully distributive?	Power Distribution? Accountability?		Relationship with the state?	Codified? Narrowly?		Degree of Presence
<b>1923 Constitution</b>	--	-	+	-	-	-	-	+	+	-
<b>1964 Constitution</b>	++	+	+	-	+	-	-	+	+	-
<b>1977 Constitution</b>	--	-	-	-	-	-	-	-	-	-

Table 4. Comparing factors.

The above illustration shows that Islam played a critical role in the writing of the 1923 and 1964 Constitutions but virtually no role in the 1977 Constitution. Conversely, negative values associated with the role of ethnicity demonstrate its complete absence from all of the constitutions. While some Constitutions, where Islam played a dominant role, allowed minimal representation in the codification process, subsequent constitutions allowed virtually no representation where both religious and/or ethnic elements were absent. For example, even though the 1923 Constitution was highly influenced by a predominantly secular Turkish institutional mode, the framers still “kept religious legitimation in the Constitution despite the ensuing lack of clarity and inconsistency in the formulations.”<sup>161</sup> Later the status of Islam was gradually deemphasized, from provisions of Hanafi jurisprudence, to Shari’a, to mere symbolic status of “Islam” as the state religion. The continual absence of ethnic elements and the decreasing importance of Islam in the constitutions both had detrimental affects on constitutional legitimacy, as evidenced by the failure of the 1977 Constitution. This shows that the factors of Islam and ethnicity share an inverse relationship with one another. In other words, if Islam is narrowly defined, than ethnicity will play no role. Conversely, as demonstrated by the above illustration, the absence of both tribal and religious elements had extreme consequences to the legitimacy of any of the Afghan Constitutions. It is evident that

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<sup>161</sup> Asta Olesen, *Islam and Politics in Afghanistan*, 122.

without the inclusion of one or the other of these elements the state is largely an illegitimate organization.

Part of the analysis regarding the original drafter's modernizing influences exposed a direct relationship between ethnicity, sovereignty, and individual liberties. The advent of modern Afghan thought, as influenced by the pan-Islamic movement, brought about an increased desire to incorporate the greater Islamic *umma*, or community of believers. At the same time, the legitimating influence of the *ulama* still held powerful sway. The greater Islamic *umma* however included diverse ethnic elements, which created a conflict of interest among the drafters. In order to draft the constitutions that included what they considered the Islamic *umma*, widespread liberties were necessary. Individual liberties and full distribution of sovereignty, however, were never fully realized in these constitutions, as was the absence of ethnic representation.

The problem with the willingness to unite the greater *umma*; lie with the assumption that it comprises not only the Sunni majority and Shi'ite minority but it additionally presumes various ethnic elements. The separation of these two Muslim sects cuts across ethnic and tribal boundaries and demonstrates the importance of the balancing effect they play on one another. The Hazara Shi'ite, for example, have inhabited the central region of Afghanistan for over a thousand years, living virtually surrounded by Sunni Muslims for as long, in spite of the shared experience of resisting external aggression, was unable to reach a conciliatory arrangement. Racial differences and the denigration of the status of the Hazara by other Afghan tribal groups consistently widened this gap. The 1923 and 1964 Constitutions, both demonstrate the marginalization of tribal and ethnic groups by narrowly defining the religion. While the 1923 Constitution held promise, at first, with generally including Islam as the state religion, it was later amended to enshrine the Sunni Muslim Hanafite School of jurisprudence, thus alienating a large portion of Afghan society. This was further exacerbated by the provision that "Hindus and Jews wear distinctive badges and pay special taxes." The 1964 Constitution merely continued the tradition of particularizing the Hanafite legal tradition. Daoud's Constitution completely ignored the religious and ethnic order of society with fatal results.

The above illustration revealed an obvious assumption that a direct relationship existed between the distribution of sovereignty equally among the people and codifying the relationship between individuals and the state. These two factors are also directly proportional to the representation of society in the codification process of the Constitution. Where the 1964 Constitution had some element of representation in the codification process, this was only due, in part, to the balancing effect that the *ulama* played against the newly educated urban elite, in trying to maintain a traditional conception of the state. The table shows both positive and negative results in this field to demonstrate that only partial representation existed.

The factors of power distribution and legal status do not seem to follow a specific pattern. This inconsistency is due primarily to the intent on designing the institutions in such a way that would keep the power centralized in the executive body. For example, even though the 1964 Constitution appears to offer more promise as a liberal document, accountability was limited and amenability, while enshrined, was discouraged because it meant the complete dissolution of the *Shura* in the case of adopting amendments.

Unlike Islam, factors of tribal ethnic dynamics have never been recognized constitutionally and this has had unique effects on all of the propositions discussed above. The marginalization of the ethnic participation process of the government administration runs consistently through all the constitutions and has always been a point of contention in the continual attempt of the regime to co-opt certain institutional apparatus' based on the ethnic aspect. For all of the constitutions, the institutional apparatus was affected at all levels particularly the ministry, but also at the sub-national level of administration. The ministry comprised members most closely related to the king or president, whether kin-based, within his own family structure, or tribal based, within his own larger tribe and a large patronage network was created at the sub-national in order to prevent large tribal coalitions and keep the tribes fragmented. Muhammad Daoud, whose constitution intended to prevent this, in reality, reverted to the same practice after removing many of the Party members from positions in the Ministry who were initially responsible for getting him into office. As Michael Griffin pointed out in his book, *Reaping the Whirlwind: Afghanistan, al-Qa'ida, and the Holy War*, an omnipresent conundrum has always existed in that, "whatever happens in Kabul only matters in the provinces to the

extent that it undermines – or not – the foundations of the local power custom.”<sup>162</sup> This statement speaks to the conditional relationship that has existed between the state and society. All constitutional attempts at bringing a national identity to the forefront of tribal consciousness within Afghanistan have failed. Most non-Pashtun Afghan’s have had troubles identifying themselves with the term ‘Afghan’ because of its historical linkages with the creation of Abdur Rahman’s Afghan state. The dominance of Pashtun tribal politics at the state level, particularly the recent memory of Daoud’s attempts to create a separate Pashtunistan have left bitter memories in the minds of non-Pashtuns throughout Afghanistan and as a result has been difficult to reconcile. The tribal question again comes to mind in the analysis of the current constitution of Afghanistan. Keeping in mind, the Hazara community for the first time achieved a legitimate voice in the proceedings of the Constitutional *Loya Jirga*, which has set the stage for all future politics on a multi-ethnic and tribal scale.

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<sup>162</sup> Michael Griffin, *Reaping the Whirlwind: Afghanistan, al-Qa’ida, and the Holy War*, (London: Pluto Press, 2003), 35.

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## **V. LEGACY AND IMPACT? A NEW DESIGN FOR AN OLD JACKET**

### **A. INTRODUCTION**

The 27-year period between Daoud's Constitution of 1977 and the most recently ratified 2004 constitution was a period that nearly crumbled all of the institutions of the state. This included 10 years of Soviet military occupation, nearly 6 years of Taliban rule and 11 years, here and there, of utter political dysfunction by political elites hungry for power. The period between 1978 and 2001 was not without more attempts at experimenting with constitution writing. After the death of Daoud in April 1978, a new pro-Soviet sympathizer, Nur Mohammad Taraki, was put into place and proclaimed Afghanistan the Democratic Republic of Afghanistan. Under the control of the Soviet Union, Afghanistan underwent several regime changes. Hafizullah Amin followed Taraki in 1979; Babrak Karmal followed Hafizullah in 1980; and Najibullah followed Karmal in 1986. Najibullah's constitutional experiment of 1987 was an attempt by a weak regime to regain control of a chaotic situation. Unfortunately, by the time the Soviets had begun their withdrawal the political and economic situation had spun so far out of control that the constitution was rendered meaningless. Revolts, mutinies, and underground militant party's all formed along ethnic and religious frontiers and created an enormous power vacuum after the communist regime was overthrown in April 1992. The spirit of the 2004 Constitution has to keep in mind the 10 years of chaotic, confused, schizophrenic, and despotic Taliban religious rule, the 12 years of Soviet-sponsored dictatorship, and the several failed constitutional-experiments that remain in the memory of the drafters. This Chapter is designed to analyze the 2004 Constitution using the same propositions used throughout this thesis. It then moves on a comparative analysis of the factors across all the Constitutions studied in this thesis. This is designed to demonstrate the influence that the 1964 Constitution had on the writing of the 2004 Constitution, as well as reveal missing elements, if any, that may affect the longevity of the Constitution.

### **B. 2004 CONSTITUTION**

The implications from this constitution are expected to demonstrate how well Afghanistan has addressed past and present memories of state building. Table 5 provides

an overview of the expected results from the propositions made throughout this thesis on Afghanistan's history with constitution writing. Associated values with positive annotations suggest the quality in which unique aspects of Afghan society are addressed and/or incorporated which will determine whether it can withstand future conflict or whether it will wither into another failure destined to be abolished by a future regime. It will also show the link between societal and ethnic inclusion with the representation presented by the Loya Jirga and will show that full representation of all elements of society correlates with the wide distribution of sovereignty and rule of law. The next section begins by analyzing the elaborate process in which the 2004 Constitution was finally ratified.

	Codification	Legal Status		Sovereignty	Institutions		Individual	Religion		Ethnicity
	Representative?	Supreme? Amenable?		Fully distributive?	Power Distribution? Accountability?		Relationship with the state?	Codified?  Narrowly?	Degree of Presence	
2004 Constitution	++	-	+	+	+	+	+	+	-	+

Table 5. 2004 constitutional factors.

### 1. Codification<sup>163</sup>

The drafting of the 2004 constitution will hold an unmistakably superior position in the history of Afghan politics. Often viewed as the single legitimizing force for establishing authority, *Loya Jirgas* of the past and the present mean a great deal to the people of Afghanistan. The following discussion will proceed in chronological order from the selection of the drafting commission to the election of the delegates to the Constitutional *Loya Jirga* and final ratification.

As in the past, the assigned mission of the first two committees was the writing and producing of a working constitutional draft for the Constitutional *Loya Jirga*. The

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<sup>163</sup> Most of the source material – articles, reports, speeches and commentaries – that can be found regarding Afghanistan's 2003 Constitutional *Loya Jirga* is located under the "Afghanistan Reconstruction Project" at the Center on International Cooperation website, [http://www.cic.nyu.edu/archive/conflict/conflict\\_project4.html#Legal](http://www.cic.nyu.edu/archive/conflict/conflict_project4.html#Legal), as well as [http://www.cic.nyu.edu/archive/conflict/conflict\\_translations.html](http://www.cic.nyu.edu/archive/conflict/conflict_translations.html) (accessed 15 April 2005).

first was a small nine-member committee, also known as the Drafting Commission<sup>164</sup>, selected by the interim President, Hamid Karzai, with advisory inputs from the United Nations. The mission of this committee was to provide a working draft for a larger committee to review. Unlike the previously analyzed constitutions, which drew primarily from models of foreign influence, the 2004 constitution was essentially a rough copy of the 1964 Afghan Constitution. The submission of this rough draft went to a larger, 35-member committee, or Constitutional Commission,<sup>165</sup> selected by Karzai. It was the mission of this committee to review the document more carefully and with the aid of an extensive public outreach campaign produce a document with the view to a closer portrait of Afghan reality. The campaign began in June 2003 and was organized by the Secretariat of the Constitutional Commission of Afghanistan. This campaign was similar to the public campaign for the 1964 constitution. It included public consultations<sup>166</sup> working through, “focus groups, including elders, *ulama* (Islamic scholars), women, business groups, youth groups, Afghan employees of NGO’s and international organizations, as well as former Emergency *Loya Jirga* (ELJ) delegates.”<sup>167</sup> The reactions to the public consultation period revealed mixed results. Afghans polled felt relieved over the continuing peace process and reestablishing the rule of law, but others felt uneasy about minor elements such as the acknowledge of other languages beside Pashto and Dari.<sup>168</sup> Despite the enormous amount of data collected, the constitutional consultation phase including the ELJ earned a great deal of criticism particularly aimed at the initial representation of the ELJ and the lack of security during the voting process for the CLJ. Many critics believed the population did not adequately represent the ELJ since

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<sup>164</sup> Secretariat of the Constitutional Commission of Afghanistan, *The Constitution-Making Process in Afghanistan*, (Prepared by the Secretariat of the Constitutional Commission of Afghanistan, 10 March 2003), 2.

<sup>165</sup> Secretariat of the Constitutional Commission of Afghanistan, *The Constitution-Making Process in Afghanistan*, (Prepared by the Secretariat of the Constitutional Commission of Afghanistan, 10 March 2003), 2.

<sup>166</sup> The consultation process included approximately 178,000 Afghans, 19 percent of whom were women. A total of approximately 556 meeting were held and 50,000 written comments were received. International Crisis Group, “Afghanistan Briefing: The Constitutional *Loyal Jirga*,” Kabul/Brussels, 12 December 2003. <http://www.icg.org>, 2.

<sup>167</sup> Manoël de Almeida e Silva, United Nations Assistance Mission in Afghanistan (UNAMA) Press Briefing by 15 June 2003, <http://www.unama-afg.org/news/pb/english/2003/june/03jun15.htm> (accessed 12 March 2006).

<sup>168</sup> International Crisis Group. “Afghanistan Briefing,” 2.

the Rome Group dominated its members,<sup>169</sup> along with former Mujahidin members of the Northern Alliance, and traditional *ulama*. In spite of the great deal of criticism over the membership of the ELJ, the Constitutional *Loya Jirga* produced a body resulting from a comparatively representative electoral process.<sup>170</sup> To be sure, “The United Nations had more time to make the CLJ elections more secure, hence the warlords and *jihadi* leaders had lost some of the capacity to intimidate, which they had exercised at the ELJ.”<sup>171</sup>

The election that took place produced a body of 19,000 Afghan citizens, elected from all provinces, and organized into an electoral college in order to vote for 408 of the 502 member Constitutional *Loya Jirga*.<sup>172</sup> The Constitutional *Loya Jirga* that took place on 14 December 2003 was unlike any of its predecessors. The electoral college subsequently voted for 344 men and 64 women as provincial representatives. President Karzai then appointed 50 men and women of equal proportion. Finally, the remaining 42 people were chosen to represent various minority groups including 24 refugee representatives, 9 nomads, 6 for internally displaced people (IDP), and 3 to represent the Hindu and Sikh minorities.<sup>173</sup> Criticism surrounding the membership of the CLJ and subsequent review process of the constitution included the formation of alliances or factions.

As with past *Loya Jirgas* where groups aligned along tribal and religious lines, the 2004 *Loya Jirga* formed traditional religious and tribal alliances. With the inclusion of women and other minority ethnic groups, however, new issues began to emerge that were at the forefront of many of the debates. The primary emphasis of these new groups focused on human rights, especially the status of women, narcotic and drug trafficking, and ethnicity. None of these debates was without drama, especially regarding the

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<sup>169</sup> The Rome Group included members of the exiled royal family.

<sup>170</sup> According to a joint investigation headed by UNAMA, the Afghan Independent Human Rights Commission, and the ministry of interior, the election results reflect the balance of power in most regions and delegates in the traditional rural communities of tribal areas represented the elders. International Crisis Group. “Afghanistan Briefing,” 10.

<sup>171</sup> Barnett R. Rubin, “Crafting a Constitution for Afghanistan,” *Journal of Democracy* 15, no. 3 (July 2004): 10.

<sup>172</sup> Dr. G. Rauf Roashan, “Afghan Constitution an Exercise in Nation Building a Test in Social Organization,” The Institute for Afghan Studies, <http://www.institute-for-afghan-studies.org/Contributions/Commentaries/DRRoahsan> (accessed 02 May 2005), 2.

<sup>173</sup> Presidential Decree (15 July 2003), 1-2.

women's groups.<sup>174</sup> In spite of the criticisms, the debates that ensued and the final draft that was approved was a genuine demonstration of the democratic process. The CLJ was arguably the most representative body of Afghan citizens that were involved in the making of any Afghan constitution.

## **2. Legal Status**

The ratified Constitution clearly assumed the prevalent role of Islam concerning constitutional legal supremacy. Prior to the Constitutional *Loya Jirga*, the initial draft had applied a shared-supremacy between that of Islam and the Constitution, but later it was removed in order to, “add strength to the Islamic nature of laws in the country.”<sup>175</sup> Article Three abrogated the supreme legality of the constitution in favor of declaring the tenets of Islam supreme and that, “no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.” In terms of Sajó's analysis of constitutional legality this means that Islam is regarded as the, “starting point and ending argument of a legal system.”<sup>176</sup> However, relegating the provisions of the constitution as subordinate to Islam does not mean that it is not binding. To be sure, several articles enshrine the fundamental duty of all aspects of Afghan state and society to uphold the principles laid out in the constitution. These incorporate all parts of the state apparatus including, the national assembly, the ministers, the president, the state administration and the Supreme Court.<sup>177</sup>

The amendment process, if codified in a constitution serves the purpose of limiting the government's ability to declare laws absolute including the constitution. It is also meant to be a difficult process so as to prevent governments from changing laws at will. The 2004 constitution serves this purpose in Article 149 and 150, which ensures that all parts of the government apparatus are involved in the process. Amendment proposals must first be made upon approval by the President and two-thirds of the

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<sup>174</sup> One woman, Malali Joya, from Farah Province spoke to the council criticizing the choice of the committee officer. After an attempt on her life, she later had to be taken to an undisclosed location under United Nations protection. Dr. G. Rauf Roashan, “Afghan Constitution an Exercise in Nation Building a Test in Social Organization,” 7.

<sup>175</sup> Roashan, Dr. G. Rauf. “Afghan Constitution an Exercise in Nation Building a Test in Social Organization.” 4.

<sup>176</sup> András Sajó, *Limiting Government*, 39.

<sup>177</sup> 2004 Constitution, Article 5, 56, 60, 75(1), 90(6), 142, and 162.

National Assembly. The President then issues a decree to form a commission made up of members of the Government (Ministers), *Shura* (National Assembly), and the Supreme Court in order to draft the proposal. Submission of the proposal then goes to the *Loya Jirga*, convened by Presidential decree specifically for this function, and finally approved with the vote of two-thirds of its members. There is no dissolution of the national assembly, as in the 1964 constitution. .

Constitutionalism, the theory of limited government, cannot be limited if it can create laws willy-nilly or declare laws absolute. While this seems contradictory in nature this is exactly the purpose that constitutions. While the provisions made in the constitution that established its superior status were no less binding than previous constitutions, its supreme status was subordinate to Islam but so long as its provision were compatible with Islam, than it was a binding document. Additionally, the difficulty with which adopting amendments was made possible, showed that not only was it a binding document but that it was self-restricting.

### **3. Distribution of Sovereignty**

Article Four established that, “national sovereignty belongs to the nation...and was manifested through its elected representatives. Elected representatives are present in the assembly and in the *Loya Jirga*. Therefore, sovereignty is manifested at two levels within the government apparatus, first the national assembly and second the *Loya Jirga*.<sup>178</sup> This two-tiered hierarchal approach to national sovereignty was very similar to the 1977 Constitution where the *Loya Jirga* was characterized as representing the highest will of the people. The important difference here is that the assembly codified in the 2004 Constitution is an entirely representative electorate of the provinces in which they are elected. Since there is no single-party establishment and no requirement for Party membership, full representation of the populace is more attainable.

On the other hand, the Constitution specifically delineates between the will of the people and the will of God. This means, again going back to Oleson’s models of state legitimation, that as long as the will of the people is compatible with the will of God than there is no contradiction to the exercise of sovereignty within its constitutional limits. This is compatible with the language that established the constitution’s superior status.

<sup>178</sup> 2004 Constitution, Article 81 and 110.

That is, as long as it is compatible with Islam, it is therefore sovereign and binding. The major assumption is that the assent of a majority will respect this and not infringe upon the rights of individuals.

#### **4. Relationship Between the Institutions of the State**

The state of government institutions at the conclusion of the Taliban regime was in ruins. The only institution that remained was the *Jirga* but this body was distorted in such a way that it no longer held the traditional meaning of a *Jirga*.<sup>179</sup> The expression of this complete chaotic situation demonstrated the overwhelming responsibility bestowed upon the 2003 Constitutional *Loya Jirga* to reintroduce institutions of the state that reflect the current circumstances as well as distribute powers among the institutions and make them accountable the one another.

##### **a. Separation of Powers**

Complete separation of powers, as Sajó would point out, is not to be taken literally. It is important to realize that institutional decision-making relies on joint input from the other branches of government. The 2004 Constitution structures Afghanistan's government as a strong Presidential system.<sup>180</sup> According to Shugart and Carey, this is a classic definition of "pure" presidentialism in that the President is, "popularly elected, with fixed terms of office, has exclusive responsibility over the cabinet, and has some lawmaking authority."<sup>181</sup> Article 82 provides for a bicameral legislature made up of an upper house or House of Elders (*Meshrango Jirga*) and lower house or House of the People (*Wolesi Jirga*). Membership of the lower house is through popular election proportion by population amongst the provinces and membership in the upper house, on the upper hand, is divided amongst the President, the Provincial Councils, and the District Councils.<sup>182</sup> Article 92 gives the power of no-confidence voting to the lower house. The next institutional body enshrined in the 2004 Constitution is the *Loya Jirga*. Article 111 gives the power of Constitutional amendments and impeachment of the President to the

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<sup>179</sup> The original *Jirga* during Mullah Omar's time as leader of the Taliban regime in 1994 consisted of only 10 members and most of them were either Durrani or Ghilzai Pashtuns. Ahmed Rashid, *Taliban: Militant Islam, Oil, and Fundamentalism in Central Asia*, (New Haven, CT: Yale University Press, 2000), 98.

<sup>180</sup> 2004 Constitution, Articles 63(11), 71, and 77.

<sup>181</sup> Shugart and Carey, *Presidents and Assemblies*, 19.

<sup>182</sup> 2004 Constitution, Articles 83 and 84.

*Loya Jirga*. While the body is made up of all the institutions of the state, the National Assembly is the only body with voting rights.<sup>183</sup> Finally, Article 116 establishes the Supreme Court as the highest judicial authority. The primary power of judicial review is granted to the Supreme Court via Article 121. It specifies that the Supreme Court have the power to “review all laws, legislative decrees, international treaties, as well as international covenant for their compliance with the Constitution and their interpretation in accordance with the law.”

**b. *Lines of Accountability***

Checks on Presidential power are codified for the first time in the 2004 constitution. While Article 94 grants veto power to the President regarding legislation, the *Wolesi Jirga* has the right to review the matter again and approve legislation with a two-thirds vote. Another check on Presidential powers granted to the *Wolesi Jirga* in Article 117, is the endorsement of the selection of Supreme Court Justices by the President. The *Wolesi Jirga* is also granted checking powers over the executive department as Article 92 codifies the no-confidence voting procedure. In the event that the lower house is suspicious of any member of the cabinet, only 20 percent of house has to propose an inquiry, but a majority has to vote for dismissal. Article 121 confers the act of Judicial Review upon the Supreme Court thereby allowing for a check on the legislative and executive branches of government.

Overall, the separation of powers among the various branches of government has been firmly established by this Constitution. ‘Checks and balances’ have also been codified to prevent the concentration of power by any one organ of government.

**5. *Individuals and the State***

The constitution appears to show a particularistic nature by recognizing every major tribe in Article four. The nature of the role of women played a large part in the moderate language regarding Islam and the codification of human rights. The 2003 *Loya Jirga*, represented the largest group of women in Afghanistan’s constitutional history. This group led the way for the inclusion of the human rights declaration, with no resistance and no Islamic limits placed on it. In addition to codifying many fundamental

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<sup>183</sup> Ibid., Article 110(1).



human rights and freedoms, Article 137, in deference to the governments centralizing policies grants autonomy to local administrations to, “accelerate and improve economic, social as well as cultural matters, and foster peoples’ participation in developing national life.” The formation of Provincial, District, and Municipal Councils facilitate part of this by encouraging participation at the local or village level.<sup>184</sup>

## **6. Religion and the State**

The first three articles of the constitution continued the trend of enshrining Islam in the constitution. During the drafting process some of the most heated debates and heavy criticism from the international community took place over the status that the role of Islam played in the Constitution. It should not be underestimated however, the binding nature in which Islam has played in Afghan society. One of the few commonalities that can be recognized among the majority of Afghans is the religion of Islam and this is the primary reason it has played such an integral role in constitutions, past and present. In spite of its overall status, criticism focused on the particularity of the faith or the sect, more specifically the traditional role of Sunni Islamic jurisprudence following the Hanafite School of law. The shifting tradition of excluding non-Sunni Muslims changed however with the increasing role the smaller ethnic groups had played, especially the Hazara.<sup>185</sup> For example, the “near-parity” status given the Shi’ite jurisprudence in Article 131 was a milestone in the political role of Shi’ite groups<sup>186</sup> including the Hazara, the Qizilbash, and Pamiri ethnic-tribal groups. With a break from the past, the framers recognized that religion is a cost-effective affair in Afghanistan, which gave the liberty to practice faiths freely within the limits of the law. The risk involved with such language assumed that the religious practiced respected the national Islamic religion. As Roy expressed in light of the external threats that Afghanistan faced in the past, i.e. Great Power politics in the nineteenth and twentieth centuries, Islam was the “energizing power” successful enough to resist that threat.<sup>187</sup> Therefore, it was important to enshrine Islam in a more broad context than the more narrow version that previous regimes had

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<sup>184</sup> 2004 Constitution, Article 140.

<sup>185</sup> Refer to Figure 1. The Hazara make up the third largest ethnic group in Afghanistan, next to Pashtun and Tajik.

<sup>186</sup> Barnett R. Rubin, “Crafting a Constitution for Afghanistan:” 14.

<sup>187</sup> Olivier Roy, *Islam and Resistance in Afghanistan*, 62.

used. Although there were great fears that the radical Islamists would influence control over the language of Islamic jurisprudence by narrowly defining the role of Islam and reestablishing the Hanafite school of law and citing the Shari'a. Their role, however, was greatly diminished by the distributive nature of the representative groups present at the *Loya Jirga*, especially the women and the non-Sunni Muslim groups.

## **7. Ethnicity and the State**

Perhaps the first ever reference made to tribes is made in the 2004 Constitution in Article 6, which codifies the egalitarian treatment of, "all ethnic groups and tribes." Another interesting recognition of the tribal fragmentation is mentioned in Article 16. As with previous constitutions, it established Pashto and Dari as the official languages but unlike other constitutions, it recognized by name any other major spoken language in the area in which it is spoken as the third official language. Other tribal inclusions include Article 20, which requires that the names of the tribes be mentioned in the National Anthem. As far as the functional representation, this is provided for by creating institutions that are conducive to ethnic realities. What is problematic with this Constitution is the lack of clarity between important legal traditions such as tribal and religious law. Perhaps the representative nature present at the 2003 *Loya Jirga* served this purpose and the subsequent makeup of the National Assembly that forms future *Loya Jirgas* will fulfill this purpose as well.

## **8. Constitutional Reality**

It is too soon to tell whether or not the 2004 Constitution will have a lasting positive impact. Much of Afghanistan is isolated and rural and this element of society which has lived with the memory of repressive communist regime policies followed by a radical religious regime, whose intent it was to force Islam back into society on a radical and often brutal platform. Much of the rural elements have not yet been given the opportunity to experience the liberties the Constitution has enshrined. Many fear however, that liberties more common in modern western society were supplanted disproportionately in the Constitution and do not respect the deeply religious and conservative society. Many also criticized the writing process calling it illegitimate because many of the former Mujahidin and Northern Alliance military commanders were members and thus influenced the draft language. To be sure, James Ingalls argued that

the Constitution was a step backward for democracy. “Warlords were able to participate not because a majority of Afghans put them there, but because Washington decided to use them first as suppliers of ground troops to help out the Taliban and then as governors to help control the population once the Taliban rulers were gone.”<sup>188</sup> Since the ratification of the Constitution, however, national provincial elections were held on 18 September 2005, without any major incidents. Although primarily foreign forces provided security, it was intended to provide an environment that was conducive to maximum electoral participation. The constitutional process of deliberation within the National Assembly so far has been without incident. However, a number of issues are at the forefront of the Assembly’s ability to deliberate even in the face of conflict. Some of these issues include the lack of an accurate census which has caused many to raise questions regarding the number of seats apportioned in the legislature, the high number of legislators with suspected links to former mujahidin, and the formation of political parties which some have criticized have a much larger connection to former mujahidin than previously suspected.

### **C. COMPARING VALUES AND CONCLUDING RESULTS OF THE 2004 CONSTITUTION**

The 2004 Constitution provides a positive solution to Afghanistan’s checkered past with constitution writing. In the current constitution, as Table 6 illustrates, positive accommodations were made to Afghanistan’s fragmented society, which all previous Constitutions failed to accomplish. Moreover, the present analysis revealed an important relationship to the codification of ethnicity with many of the propositions. As illustrated, it has a direct relationship to propositions such as the full distribution of sovereignty and the relationship between individuals and the state. In other words, as ethnicity was ignored in the past, so too was the limited distribution of sovereignty and the subjugation of individuals. The opposite holds true for the 2004 Constitution in that the inclusion of ethnicity brought with it the full distribution of sovereignty and individual rights. Ethnicity also appears to have an indirect relationship to institutions of the state and the establishment of accountability. For example, all of the Afghan states studied in this thesis were centralized including the current Afghan state. However, increased

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<sup>188</sup> James Ingalls, “The New Afghan Constitution: A Step Backwards for Democracy.” *Foreign Policy in Focus* (March 2004). <http://www.fpiif.org/papers/2004afghanconst.html> (accessed 25 May 2005).

representative participation in the codification process and the positive value of the presence of ethnicity in the constitution directly affected the codification of accountability between the institutions of the state. Even with a strong presidency, the power of impeachment was codified along with a check on the executive power to appoint ministers. Finally, the codification of ethnicity also influences religion in the constitution. This table illustrates an inverse relationship present between religion and ethnicity. Where ethnicity played no role in previous constitutions, it gave the writers the liberty to either leave religion out altogether or define religion very narrowly. The partial values placed on the status of religion in the 2004 Constitution represent the balancing nature that Islam and ethnicity have on the other. For example, if the degree to which ethnicity is codified is high, it assumes the representation of ethnic groups that fall outside the mainstream Sunni Muslim population. As the 2004 Constitution shows, Islam is codified as the state religion with no limitations as to the particular legal school – as with previous constitutions. In addition to the observance of Islam as the state religion, the current constitution specifically recognizes other religious practices.

	Codification	Legal Status		Sovereignty	Institutions		Individual	Religion		Ethnicity
	Representative?	Supreme?	Amenable?	Fully distributive?	Power Distribution?	Accountability?	Relationship with the state?	Codified? Narrowly?	Degree of Presence	
1923 Constitution	--	-	+	-	-	-	-	+	+	-
1964 Constitution	-+	+	+	-	+	-	-	+	+	-
1977 Constitution	--	-	-	-	-	-	-	-	-	-
2004 Constitution	++	-	+	+	+	+	+	+	-	+

Table 6. Comparison of values of all propositions made for each constitution.

#### D. IMPLICATIONS TO INSTITUTION BUILDING

Understanding the dynamics of the *Loya Jirga* must be a critical aspect of Afghan state and society relations. Its association as a tribal council has been used in the past as an attempt to legitimize the state and has since become enshrined in nearly all of Afghanistan's Constitutions. In the past, however, the state refused to grant the complete

participation of all the ethnic elements of Afghan society, thereby diluting the traditional significance and application of its principles to building a representative state apparatus. The 2004 Constitution was created by a representative *Loya Jirga* and enshrined the body of the *Loya Jirga* as the manifestation of Afghanistan sovereignty. Membership of the *Loya Jirga* by the National Assembly and other institutions of government is meant to provide a representative portion of society. This is achieved primarily through the National Assembly, which is some combination of popularly elected representatives as well as provincial and district council representatives from all provinces of the country. Therefore, it is through the *Loya Jirga* that representative decisions can be made to determine the future of the Afghan state, provided that the terms of the Constitution bind the society.

### **1. 1964 and Implications to Constitution Writing**

Afghanistan has had seven constitutions written since 1923, of which four actually made it past the signing stage and became official, including the 2004 Constitution. The first two Constitutions were made to incorporate many modernizing policies but at the expense of excluding a major portion of the population. To be sure, the *qawm* was still the primary source of local administration even up to the writing of the 1964 Constitution, which offered a moderate model for which Afghanistan could codify its traditional institutions. The framers of the 2004 Constitution chose 1964's Constitution as a model for two reasons. First, it codified the *Loyal Jirga* and made its membership more representative. As stated earlier, nearly all ethno-linguistic tribal groups in Afghanistan follow some form of tribal customary code and the embodiment of this legal system takes the form of a tribal council, better known by its Pashto term for *Loya Jirga*. Legitimacy of the state, in the past, was sought through this body, and thus the codification of its supreme status in the constitution was meant to provide a positive sign to the countryside that their interests were being served. Secondly, the 1964 constitution incorporated a near equal status between the importance of Islam and its role in society and democratic elements such as human rights and liberty for all. The democratic elements enshrined in the constitution were trumped by the manner in which checks and balances were absent and power remained with the monarchy and a small group of elites. The 1964 Constitution was also an appealing model because it offered a

way in which Islamic traditions could be made compatible with the rule of law created by the Constitution. This was demonstrated by making it difficult to amend the constitution, which according to Sajó is necessary to prevent the constitution “from becoming victim of incidental considerations at any time, if any one of its prescriptions were to obstruct a prevalent legislative interest.”<sup>189</sup> The 1964 Constitution also represented the ideal structure in which full representation could best be achieved through a legislative apparatus that is primarily through a two-tiered legislative body. Lastly, the 1964 constitution created the framework that offered the first chance at free, universal, and direct elections. Although lessons show that full representation was not always achieved, this was because factors of sovereignty, relationship established between individuals and state, and ethnicity were not fully represented. As past Constitutions have shown and as evidenced by the previous analyses, these factors have played an integral role in the long-term sustainability of previous constitutions as well as impacts on state stability. The next section discusses further the impact the Constitutions have had on state building in Afghanistan.

## **2. The State**

Designing a constitution must take into account the historical memory of state institutions. How effectively those institutions administer and perform legislative duties are an essential task of government and will provide a partial explanation for the success of constitutionalism in any nation. The 1964 Constitution offered the best solution to an institutional concept of design; that is, the bicameral legislature. The privilege offered by popularly elected membership as well as the license to enact legislation provided the best option in which government could be fully representative and reflect the needs, desires, and historical memory of the populace. But there are many dangers that came with choosing the 1964 Constitutional model for the new Afghan government. First, the intention to create a representative parliamentary government in 1964 was part of a plan to reform the countryside and become more modern by building up the central infrastructure. There was no plan to abolish the monarchy in favor of doing this, no plan to reduce the narrow definition of Islamic traditions – it still enshrined the Hanafite School of Islamic jurisprudence which disenfranchised almost of quarter of the

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<sup>189</sup> András Sajó, *Limiting Government*, 39.

population, – and no plan to provide for some provision of accountability between institutions. In other words, there were no checks and balances. The lessons of the 1964 Constitution, taken starkly in the language of the 2004 constitution, has created an administration granted more power to carry out its business at the local level, more power to make egalitarian decisions, and is more capable of exhibiting a full representative portion of Afghan society.

### **3. The Society**

Afghanistan's rural population has always been a stranger to the central government but there has never been a successful plan at forging a relationship between the state and the society in Afghanistan. What has usually been the case is building a government infrastructure around local ethnic-tribal power groups and co-opting other important religious groups by including them into the institutional design but diminishing their ability to influence any state decision-making. This practice has consistently kept the government out of the presence of local communities as well as continued the trend of centralization. Too often, these centralizing tendencies of the government in Kabul have failed to control rural Afghanistan and pitted traditional Afghan society against state institution building. As a result, Afghanistan's constitutional history has been replete with attempts by the state to either subdue the political power of ethnic organization or co-opt it. The framers of the 2004 Constitution believed the 1964 Constitutional framework was considered the most egalitarian institutional model in which important elements that comprised Afghan society could be incorporated. The writers also recognized that the 1964 Constitutions also carried with it important lessons when writing a constitution for a multi-ethnic tribally fragmented society.

The concluding Chapter offers a few alternatives to institutional design in Afghanistan. It will also offer suggestions that challenge policy perspectives regarding U.S. interests in the region.

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## **VI. CONCLUSION**

### **A. INTRODUCTION**

Afghanistan's current Constitution provides merely a partial solution to the challenges of a multi-ethnic and fiercely tribal society that have been exacerbated by twenty-five years of misrule. The solution is manifested by representative participation of all strata of Afghanistan's ethnically diverse society and given the power to change necessary institutions that reflect current and future realities. The challenge to any nation involved in the process of rebuilding whether from the ground up or from existing structures, is there is no single answer that will provide the solution to successful governance and stability. Vernon Bogdanor said "the study of constitutions cannot be divorced either from history or from politics, and that the reasons for constitutional change must be sought in the perceptions of those whom a constitution is intended to regulate – the political leaders of a country and the parties to which they belong."<sup>190</sup> If political participation of a representative portion of that society were present in addition to the full acceptance of constitutional terms by that society, than the rebuilding process would have a successful outcome. So far, political participation has been realized through 18 September 2006 with the elections of the National Assembly, but full acceptance of the constitutional terms will require more time. The answer is not present in a prescription of government organization, but whether that prescription created the conditions as stated above that have the best chance at being exercised most effectively. This answer, unfortunately, will not come overnight. The rebuilding process needs to continue but there are ways in which the 2004 Constitution allows the dynamic rebuilding process to change with changing realities. The following discusses prospects for Afghanistan's current constitution and offers some institutional alternatives.

### **B. PROSPECTS FOR THE 2004 CONSTITUTION**

Afghanistan's history of state-building has been replete with attempts to create democratic governance, but the insistence on centralizing for a variety of reasons, has prevented the government from achieving long-term legitimacy from all strata of society.

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<sup>190</sup> Vernon Bogdanor ed., *Constitutions in Democratic Politics*, (Aldershot, England: Gower, 1988), 12-13.

Centralization is spoken of here as a form of government in which power rests primarily at the executive level of state government, whether it is manifested by a monarchy or by a President. This includes the ability to allow representative and political participation from religious groups, ethnic-tribal groups, as well as all other groups for which individuals should have the freedom to construct. Centralization, however, does not mean that it is the wrong answer for Afghanistan. The structure of the institutions of government have determined the Presidential model espoused by Shugart and Carey. The separation of powers given to the separate institutions along with the amount of checks and balances that allow for accountability as well as the separate electoral process between the legislature and the executive provide a positive solution to a centralized government with all powers tied up with the executive. In addition to the separation of power at the national level, the Constitution has delegated a “necessary transfer of power” to the local level of administration to accommodate the rural strata of society.<sup>191</sup> The Constitution also provides for the participation from a representative portion of society, through membership in the *Loya Jirga*, representation in the National Assembly, the right to assemble into political parties, as well as fully distributing national sovereignty, and for the first time acknowledging the importance of tribal elements.

### **C. ALTERNATIVE MODELS AND FUTURE RESEARCH**

Other models offer long-term alternatives to Afghanistan’s current system of governance. For example, one proposal offered by M. Nazif Shahrani is in favor of a “decentralized democracy based on community self-government.”<sup>192</sup> This fits in loosely with the Federal option that was the subject of much literature prior to the selection of the Constitutional *Loya Jirga*. Another way this could be formulated is through the idea of a Consociational democracy, which, according to Shapiro, is an organization of government that offers the most remedies to the problems of highly diverse societies. “Not a majority democracy, it is a form of consensual democracy, in which all major groups are represented in governing grand coalitions in proportion to their numbers.”<sup>193</sup>

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<sup>191</sup> 2004 Constitution, Article 137.

<sup>192</sup> Barnett R. Rubin, Humayun Hamidzada, and Abby Stoddard, “Afghanistan 2005 and Beyond: Prospects for Improved Stability,” Report, (seminar held by the Royal Netherlands Embassy, Kabul, Afghanistan, 23 February 2005), 8.

<sup>193</sup> Ian Shapiro, *Designing Democratic Institutions*, 256.

The Netherlands and Lebanon offer examples in this form of governance where the major groups are associated along religious or ethnic divisions of power. The Federalism alternative yielded the largest exposure prior to the Constitutional *Loya Jirga*. The argument for this form of government is that it best favors the multi-ethnic makeup of Afghan society by reducing tensions that are normally present between geographically concentrated groups and allows them to decide their own fates.<sup>194</sup>

Another option, or a loose confederation along tribal or ethnic territories, is through the organization of the lower sub-administrative apparatus. This would require further research regarding the evolution of provincial territories in order to correlate some areas that are dominated by tribal communities. For example, topographic territories may have correlating features with provincial boundaries of areas primarily inhabited by the Pashtun. These areas roughly correlate with the belt bordering the southern plains and valleys of the Hindu-Kush, although pockets of non-Pashtun ethnic groups inhabit areas along the Iranian, Pakistani, and Afghan borders. The other large ethnic groups that fill in most of Afghanistan's remaining population are scattered about the area that roughly correlate with the mountainous areas in most of the central north region – or central highlands – including a small northern plains area bordering the central Asian states. Two prominent examples are the Hazara and the Nuristani (refer to Figure 2). The Hazara inhabit primarily the province of Bamiyan, which is roughly the center of the region known as the Hazarajat but also includes outlying parts of Ghowr, Oruzgan, Wardak, and Ghazni. The Nuristani inhabit primarily the province of Nuristan but includes that mountainous region that correlates with Laghman and Konar provinces. Each tribe is normally incident to a low-lying valley within the region and language and tribal codes may differ slightly. What this demonstrates is that if ethnic areas roughly correlate with geography, then administration and districting of these areas can be designed to reflect that.

Afghanistan's Constitution itself reflects a major accomplishment for a Muslim country to codify a constitution that incorporates western-liberal elements with Islamic traditions in a harmonious nature and offers a unique example to other democratizing

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<sup>194</sup> Henry E. Hale, "The Federal Option for Afghanistan," *Policy Brief* (New York: EastWest Institute) 1, no.7 (November 2002): 3.

Muslim states. One of the most important of these aspects, an obstacle of past constitutional projects, is the broad language of Islam that has allowed the integration of all Islamic sects into political society such as the Hazara Shi'i. As some ethnic groups will probably align themselves by their tribal loyalties or religion, the participatory process codified in the Constitution should allow for a decrease in the chance of internal conflict, an increase in peaceful bargaining, and an increase in the overall faith of the representative process.

A longer-term solution for Afghanistan, beyond the successful Bonn Process and manifested by the spirit of the 2004 Constitution must include the continued support of the United States. Recent incidents such as administrative corruption, rising unemployment, and poor relations with neighboring states have made this even more critical. The unexpected resignation of the Interior Minister and the rearrangement of the Presidential cabinet as well as the critical reports that the national assembly is a dysfunctional organization are raising grave doubts as to whether Afghanistan can live up to the terms it laid down for itself in 2003. Of utmost importance is the fostering of long-term, functioning state institutions, which will provide a critical cushion to the bargaining process. The best way in which to achieve this is to organize training outlets at various levels of government so that administrators and officials may be able to seize the opportunity of gaining valuable expertise in the functioning of their day-to-day business. Another example would be to allow more autonomous decision making at the provincial level as well as integrate reconstruction efforts amongst provincial administrations by extend training opportunities where good governance is needed. While the 2004 Constitution is a huge step forward for Afghanistan, the institution building process is a continuing effort and must go on to ensure that the constitutional provisions are met.

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